CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1928

STATE v. GEORGE WHITE.

(Filed 12 September, 1928.)

Burglary—Prosecution—Evidence Sufficient to Overrule Nonsuit—Presumptions.

Whether recent possession of stolen goods is sufficient in point of time to raise the presumption of guilt is ordinarily one of fact for the jury, and where the evidence tends to show that the owner had placed a watch and some money on a table in his room on retiring to bed a certain night and that the next morning they were gone, with further evidence that the room had been broken into and the articles thus taken: *Held*, the possession of the watch by the defendant some two weeks later and his conflicting and incomplete statements as to how he obtained possession is sufficient evidence of burglary to raise a question for the jury and resist a motion as of nonsuit.

Criminal action tried before *Barnhill, J.*, at March Term, 1928, of Pasquotank.

The defendant was indicted for burglary. The evidence tended to show that C. F. Graves returned to his home on the night of 18 October, 1927. Upon retiring he took his watch and about twenty dollars in money and laid it on a table in his room. Upon arising next morning he discovered that the watch and money had disappeared. The bathroom had a door that opened out on the back steps, running down the back porch. The door of the bathroom was found unfastened. On

24 February, 1928, the defendant was arrested for peeping into the windows of a residence in Elizabeth City. When taken to prison he was searched and the watch of the prosecutor was found in his possession. "At first defendant refused to tell where he got the watch, but later the defendant said from one 'Jess,' who was one of the men working on the new hotel, but he refused to give the last name of 'Jess,' stating that witness could not make defendant tell the last name of 'Jess.' That he obtained it from him in a trade, giving another watch and three dollars difference." Another witness for the State testified that the defendant first told him that he got the watch from a girl, but would not give her name. The defendant denied that he had ever been in the house of the prosecutor or that he had taken the watch or money, testifying further that he secured the watch from a colored man by the name of Jess by exchanging therefor a watch he owned and paying three dollars difference; that he had worn the watch, since he procured it, openly and at all times. The grandfather of defendant testified that the defendant showed the watch to him around the first of November, 1927. The mother of defendant testified that the defendant showed the watch to her before he showed it to his grandfather.

The defendant lodged a motion of nonsuit at the close of the State's evidence and renewed the same at the close of all the evidence. There was a verdict of guilty of burglary in the second degree and of larceny. From the sentence of the court, to imprisonment for not less than three nor more than five years, the defendant appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Aydlett & Simpson for defendant.

BROGDEN, J. The decisive point in the case is whether or not the evidence viewed in a light most favorable to the State was sufficient to have been submitted to the jury.

The evidence produced by the State disclosed that the theft was committed on the night of 18 October, 1927. It appeared from evidence offered by the defendant that the stolen watch was in his possession prior to 1 November, 1927, or within a period of two weeks. The defendant made contradictory statements with respect to the person from whom the watch was procured, stating to one witness that he secured it from a girl, and to another witness that he had purchased it from an unidentified man named "Jess," whose full name the defendant declined to disclose.

In some of the earlier cases it was held for law that the personal possession of stolen property raised violent, probable or rash presumptions, depending upon the length of time elapsing from the theft to the discovery of possession by the accused. *S. v. Jennett,* 88 N. C., 666; *S. v. McRae,* 120 N. C., 609, 27 S. E., 78.

The case of *S. v. Hullen,* 133 N. C., 656, 45 S. E., 513, discloses a fact situation almost identical with the case at bar. Hullen was indicted for breaking into a house in the daytime and stealing a watch. The law was thus declared: "It is not necessary that we should here draw any nice distinctions concerning the presumptions of guilt based on recent possession as being strong, probable or weak, because the court in its charge, to which there was no exception, instructed the jury that the recent possession of the defendant was only a circumstance to be weighed by them in passing upon his guilt, and this charge is sustained, we believe, by all the authorities. If recent possession of the stolen goods is evidence that defendant committed the larceny, it must also of necessity be evidence of the fact that the defendant broke and entered the house, because it is evident that the larceny was committed in the house by the person who broke and entered it, and there is no evidence that it was committed in any other way."

Again, in *S. v. Anderson,* 162 N. C., 571, 77 S. E., 238, *Hoke, J.,* wrote: "Where a theft is established, the recent possession of the stolen property is very generally considered a relevant circumstance tending to establish guilt, and when the possession is so recent as to make it extremely probable that the holder is the thief, 'that is, where in the absence of explanation he could not have reasonably gotten possession unless he had stolen them himself,' there is a presumption of guilt justifying and, in the absence of such explanation, perhaps requiring a conviction." *S. v. Rights,* 82 N. C., 675; *S. v. Record,* 151 N. C., 695, 65 S. E., 1010; *S. v. Ford,* 175 N. C., 797, 95 S. E., 154.

There is no hard and fast definition of the term "recent possession," but the trend of the decisions is to the effect that the time that must elapse after the theft of goods before their possession by the accused, should cease to be considered as tending to show guilt, is ordinarily a question of fact for the jury. Thus in *S. v. Reagan,* 185 N. C., 710, 117 S. E., 1, it was held: "The clause, 'The law presumes the holder to be the thief,' is not interpreted as a presumption of law in the strict sense of the term, but only as a presumption of fact which is open to explanation. The defendant testified by way of explanation that his coat had been stolen, but this circumstance did not impair the right of the State to have the jury pass upon the question of the defendant's recent possession, or of any presumption of fact arising therefrom." *S. v. McRae,* 120 N. C., 608, 27 S. E., 78.

The charge of the trial judge was fully in accord with the authorities and the judgment of the court must stand.

No error.

CHARLOTTE ADELE SHULL, A MINOR, BY HER MOTHER AND NEXT FRIEND, MARY J. SHULL, v. J. LORD RIGBY, ELI KENDIG, JR., A. BYRON SHULL, GIRARD TRUST COMPANY AND WASHINGTON HOSPITAL, INCORPORATED.

(Filed 12 September, 1928.)

1. **Wills—Construction—Estates and Interests Created.**

   Where B. takes an estate with use and occupancy for life in trust with discretionary power given trustees named in the will to sell trees growing upon the lands, mineral rights, etc., during the life tenancy, and from the proceeds to pay a sum named to a designated hospital, during the continuance of the life estate it is subject to the sale by the trustees of the interests specified, and where the remainderman has acquired this preceding estate the title does not merge so as to vest in him the full fee-simple title.

2. **Appeal and Error—Determination and Disposition of Cause— Remand for Necessary Parties.**

   Where residuary legatees may take a surplus after the sale of land after the payment of a specific bequest, they are necessary parties to the sale of the land to give the purchaser a clear fee-simple title, and on appeal the cause will be remanded for them to be made parties.

3. **Infants—Property and Conveyances—Power of Court to Order Sale of Property—Equity.**

   In its equity jurisdiction the court in proper instances, and in proceedings properly instituted, has the power to order the sale of property belonging to a minor. *Tyson v. Belcher*, 102 N. C., 112, and like cases cited and applied.

APPEAL by petitioner and defendants, executors and trustees, from *Moore, Special Judge,* at May Term, 1928, of BEAUFORT.

This is a proceeding by a minor, brought by her mother and next friend, to sell a tract of land situate in Beaufort County, containing 1500 acres, more or less, alleged to be the property of said minor.

Petitioner's title is derived from item seven of the will of Charlotte S. McConnell and codicil, which are as follows:

"Seventh. My farm and plantation situate in Chocowinity Township, Beaufort County, North Carolina, I hereby devise and bequeath unto my executors and trustees hereinafter named to hold same for the use and occupancy of Charlotte Adele Shull, the daughter of my nephew, Wallace Shull, of Woodbine, Maryland, during her lifetime, and on her death to convey the same to her next of kin and heirs at law; reserving at all times during her said life tenure, to the said executors and trustees, the right to cut, sell and in anywise dispose of the standing trees and timber, marl, clay, oil and any other products found on the said plantation when in their judgment it may be wise and expedient so to do, and to pay out of the proceeds of the sale of same the sum of five thousand dollars to the Doctor Taylor Hospital at Washington, North Carolina, and to also pay out of my estate all taxes on the said plantation as the same may become due and payable."

Codicil: "In the Seventh clause of my will, I devised my farm and plantation in Chocowinity Township, Beaufort County, North Carolina, to my executors and trustees for the use and occupancy of Charlotte Adele Shull, daughter of my nephew, Wallace Shull. I hereby revoke said bequest, and in place thereof, I hereby devise and bequeath said premises to my said executors and trustees together with the premises or property about being conveyed to me by my brother, A. Byron Shull, situate at Woodbine, Maryland, to hold same for the use and occupancy of my said brother, A. Byron Shull, during his lifetime, and upon his decease to convey the same to the said Charlotte Adele Shull, subject to the reservations fully set out in the above Seventh Clause of my will."

The said A. Byron Shull, now 71 years of age, has declined to accept his interest or estate in the farm and plantation in question, and has renounced and released all his interest therein, by an instrument in writing, registered in Beaufort County, to Charlotte Adele Shull.

In items ten, eleven and twelve of the will of Charlotte S. McConnell other duties are imposed upon the trustees, and disposition is made of the residue estate to several specifically named legatees, no one of whom is a party to this proceeding.

It was adjudged that the farm and plantation, including the timber thereon, be sold, and out of the proceeds arising therefrom the sum of $5,000.00 should be paid to the Washington Hospital in discharge of the legacy referred to in item seven above, and the balance to be turned over to the duly appointed guardian of the petitioner, Charlotte Adele Shull.

From this order, the petitioner appeals, contending that the Washington Hospital, mentioned in the will as "Doctor Taylor Hospital at Washington, North Carolina," is entitled to take nothing under item seven and the codicil, above set out, because of the alleged subsequent merger of the life estate with the remainder, thereby vesting the fee in the petitioner. The executors and trustees appeal on the ground that the court is without authority to decree a sale of the property upon the allegations appearing in the petition.

Guy W. Steele and Small, MacLean & Rodman for plaintiff.

Charles J. Shull and Ward & Grimes for defendants, J. Lord Rigby, Eli Kindig, Jr., and Girard Trust Company.

Harry McMullan for defendant, Washington Hospital.

STACY, C. J., after stating the case: That a court of equity has the power to order the sale of property belonging to a minor, in a proceeding properly constituted for the purpose, admits of no doubt. *Tyson v. Belcher,* 102 N. C., 112, 9 S. E., 634; *Rackley v. Roberts,* 147 N. C., 201, 60 S. E., 975; *Settle v. Settle,* 141 N. C., 553, 54 S. E., 445.

But what interest does the petitioner own in the *locus in quo?* Clearly not an unencumbered fee, for during the lifetime of A. Byron Shull the executors and trustees have "the right to cut, sell and in anywise dispose of the standing trees and timber, marl, clay, oil and any other products found on the said plantation when in their judgment it may be wise and expedient so to do, and to pay out of the proceeds of the sale of same the sum of five thousand dollars to the Doctor Taylor Hospital at Washington, North Carolina." And this right is not destroyed by the alleged subsequent merger of the life estate with the remainder. *Lummus v. Davidson,* 160 N. C., 484, 76 S. E., 474; *Haywood v. Trust Co.,* 149 N. C., 208, 62 S. E., 915; *Walker v. Sharpe,* 68 N. C., 363; *Dick v. Pitchford,* 21 N. C., 480.

We are not now called upon to say whether the legacy to the Washington Hospital is demonstrative, and therefore payable out of the *corpus* of the estate under the principle announced in *Shepard v. Bryan,* 195 N. C., 822, 143 S. E., 835. Nor is the proceeding one in which all the parties are asking that the property be sold. It would seem, however, that a sale of the timber and other products found on the plantation, either with or without the land, during the lifetime of A. Byron Shull, whether made by the trustees or under order of court, would necessarily enure to the benefit of the Washington Hospital to the extent of its interest. In this respect, the judgment was not erroneous.

It will be observed that the trustees are not directed to sell so much of the timber, etc., as may be necessary to pay the bequest to the Washington Hospital, but they are empowered to sell, during the lifetime of A. Byron Shull, any or all of the standing timber, etc., and other products found on said plantation, when in their judgment it may be wise and expedient to do so, and, out of the proceeds arising therefrom, to pay to the Washington Hospital the sum of $5,000.00. What would become of the excess, if the timber and other products should bring, upon sale by the trustees during the lifetime of A. Byron Shull, more than enough to pay the bequest to the Washington Hospital? This calls for a construction of the will in which the residuary legatees, who are not parties to the present proceeding, may be interested. At least their presence would seem to be necessary to insure to the purchaser an unimpeachable title. The cause, therefore, will be remanded for further proceedings not inconsistent with this opinion and as the rights of the parties may require.

Error and remanded.

JOSHUA CREECY ET AL. v. NANNIE CREECY COHOON ET AL.

(Filed 12 September, 1928.)

Appeal and Error—Determination and Disposition of Cause—Remand for Proper Judgment.

Where the clerk of the court has allowed certain attorney's fees out of the proceeds of sale in an action for partition of lands, and on appeal to the Superior Court the clerk's judgment has been affirmed without a finding of material facts or conclusions of law by the judge, upon appeal to the Supreme Court the case will be remanded for the material findings of fact and conclusions of law necessary to support the judgment, and necessary as the basis of review.

APPEAL by Winborn Lawton and Mary Lawton Walker, defendants, from *Barnhill, J.,* at March Term, 1928, of PASQUOTANK.

Thompson & Wilson for appellants.

Ehringhaus & Hall, J. B. Leigh and McMullan & LeRoy for appellees.

ADAMS, J. The petitioners instituted a proceeding for the sale of real property for partition. The appellants and other nonresidents were served with summons by publication. On 28 July, 1926, the clerk appointed commissioners who sold the property at the price of $10,930, and on 13 November the sale was confirmed. Before the confirmation (i. e. on 19 October, 1926) R. B. Creecy filed a petition with the clerk alleging that Hennie P. Creecy had died leaving a paper purporting to be her last will and testament, which had been contested and set aside; that he had employed attorneys to protect and enforce the rights of the petitioners and of all the respondents excepting Mrs. Cohoon under an agreement that the attorneys should receive a certain part of the recovery; and that the proceeds of the sale would soon be ready for distribution. He asked that a citation be issued to the interested parties requiring them to appear before the clerk and show cause why the attorneys should not be paid in accordance with the contract out of the proceeds of the sale. An order was made and the citation was served on the appellants and others by publication. None of the parties appeared and on 21 February, 1927, the clerk granted the relief prayed. On 25 June, 1927, the clerk specifically directed the disposition of the proceeds of sale, and thereafter the commissioners made their report. The appellants on 1 February, 1928, made a motion before the clerk to strike from the files the affidavit of R. B. Creecy dated 19 October, 1926, and the several orders entered in the cause on 28 December, 1926, 21 February, 1927, and 25 June, 1927, together with all other orders of like import and effect.

The motion was based upon an affidavit filed by the appellants and by William M. Lawton. On 21 February, 1928, the motion was heard by the clerk and denied and on appeal to the judge the judgment of the clerk was affirmed. From the latter judgment the present appeal is prosecuted.

It is provided by statute that a defendant against whom publication is ordered on application and sufficient cause shown at any time before judgment must be allowed to defend the action, and, except in an action for divorce, that such defendant may in like manner upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof and within five years after its rendition on such terms as are just. C. S. 492; *Burton v. Smith,* 191 N. C., 599; *Foster v. Allison Corporation, ibid.,* 166. The motion of the appellants was made in accordance with this provision. In the affidavit or petition of R. B. Creecy there is an allegation that he was "impliedly authorized by all the respondents," including the appellants, to make the alleged contract with the attorneys. The appellants denied this allegation as well as certain findings or recitals in the order made by the clerk on 21 February, 1927, and averred that they had no knowledge or notice of the affidavit and orders until the fall of 1927, or until sometime after 25 June, 1927.

The motion raises questions of fact which have not been determined either by the clerk or by the judge. The former simply denied the motion and the latter merely affirmed the judgment of the clerk. In each case the appellants excepted to the judgment and appealed. We cannot determine from the present record whether the lower court was of opinion that the appellants authorized the contract with the attorneys or whether in the absence of their assent or approval the appellants were bound by the contract because they profited by the result of the recovery in the proceeding to set aside the will or whether the judgment of the clerk was affirmed on some other ground. We cannot examine the affidavits with a view to finding the facts. *Bowers v. Lumber Co.,* 152 N. C., 604. In *Oldham v. Sneed,* 80 N. C., 15, it is said: "In the absence of any facts found we can only see from the case sent up that the judge refused to vacate the judgment, but why he did so, or whether with or without any mistake or misapplication of the law, cannot be seen." It is desirable that the material facts be found and that the conclusions of law thereon be set forth in the judgment. To this end the cause is remanded for further proceedings.

Remanded.

J. L. ABBITT v. WILLIS N. GREGORY AND THE DAVISON CHEMICAL COMPANY, A CORPORATION.

(Filed 12 September, 1928.)

1. **Equity—Bill of Discovery—Examination of Adverse Party—Evidence.**

A party to a suit has the right to examine an adverse party before a judge, commissioner appointed to take depositions, or before the clerk of the court, upon giving five days notice to the adverse party, and it is not necessary to obtain leave of court to make such examination, C. S., 900, and this result is not affected by the nonresidence of the adverse party when such party has submitted to the jurisdiction of the court by filing pleadings.

2. **Appeal and Error—Review of Interlocutory Orders—Premature Appeals—Dismissal.**

Where an order for an examination of an adverse party in order to obtain evidence is granted in an action in which the pleadings have been filed, an appeal from such order prior to the examination is premature, and will be dismissed.

3. **Equity—Bill of Discovery—Inspection of Writings—Evidence—Discretion of Court.**

It is within the sound discretion of the trial court to order a party to give to the adverse party an inspection and copy of any books, papers and documents in his possession or under his control which contain evidence relating to the merits of the action or the defense thereto. C. S., 1823.

4. **Appeal and Error—Review of Orders within Discretion of Lower Court—Dismissal.**

Where the trial court, within his discretion, has ordered a party to give to the other an inspection and copy of certain books, papers or documents containing material evidence, and the order is supported by sufficient findings of fact, and there is no evidence of abuse of such discretion, the order is not reviewable on appeal, and the appeal will be dismissed.

5. **Equity—Bill of Discovery—Extent and Rights of Remedy.**

Both an examination of an adverse party and an order for an inspection of writings in his possession or under his control may be had under our statutes.

APPEAL by defendants from order of *Moore, Special Judge,* at April Term, 1928, of PERQUIMANS. Appeal dismissed.

Both complaint and answers have been duly filed in the above entitled action, which is now pending in the Superior Court of Perquimans County.

For the purpose of procuring evidence to be used at the trial of the action, plaintiff moved the court, upon a verified petition, for an order directing (1) that defendants each give to the plaintiff the right to inspect and to take copies of certain documents and papers described in the petition, and in the possession, or under the control of the defendants, respectively, and (2) that defendant, Willis N. Gregory, and defendant, The Davison Chemical Company, and certain officers of said company, named in the petition, appear at a time and place to be fixed in said order, then and there to be examined by the plaintiff, respecting the matters and things alleged in the complaint and answers. Defendants appeared at the hearing, and having filed answers to the petition, resisted plaintiff's motion.

From the order entered by the court, in accordance with the prayer of the petition, and the motion of plaintiff, defendants appealed to the Supreme Court.

McMullan & LeRoy, Ehringhaus & Hall, Willcox, Cooke & Willcox, and Battle & Winslow for plaintiff.

Whedbee & Whedbee, Garnet, Taylor & Edwards, and L. I. Moore for defendant, Gregory.

Whedbee & Whedbee, Jesse N. Bowen and Stephen C. Bragaw for defendant, Chemical Company.

Connor, J. It is provided by statute in this State that a party to an action may be examined as a witness at any time before the trial of the action, at the option of the party claiming the right to such examination, before a judge, commissioner duly appointed to take depositions or before the clerk of the court, on a previous notice to the party to be examined and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise. Where a corporation is a party to the action, this examination may be made of any of its officers or agents. The party to be examined may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence, or where he may be served with summons for his attendance. If a party to an action, who has been duly summoned to appear and submit to such examination, refuses to attend and testify, he may be punished as for a contempt and his pleadings may be stricken out. C. S., 900 *et seq.*

It has been held by this Court that it is not necessary that a party to an action, who desires to examine an adverse party, as authorized by the statute, shall first obtain leave from the court to make such examination. The proceeding under the statute differs in this respect from the proceeding to obtain a bill of discovery, for which the statute is a substitute. *Vann v. Lawrence,* 111 N. C., 32, 15 S. E., 1031. Where, however, an order for an examination is obtained in an action in which the pleadings have been filed, and the examination is desired to procure evidence to be used at the trial, an appeal from such order, prior to the examination is premature, and will be dismissed. *Monroe v. Holder,* 182 N. C., 79, 108 S. E., 359. The appeal, therefore, from the order directing defendants to appear and be examined by plaintiff, in accordance with the terms of the order, is premature and must be dismissed. The fact that both defendants are nonresidents of this State is immaterial. They have each appeared in this action, in person and by attorneys, and are subject to the jurisdiction of the Superior Court of Perquimans County with respect to all matters involved in this action.

It is further provided by statute in this State that "The court before which an action is pending, or a judge thereof, may in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both." C. S., 1823.

Upon facts found by the judge, from evidence sufficient to sustain such findings, the judge, in his discretion, has made the order from which defendants have appealed. The facts found by the judge are sufficient to support the order which, having been made in the exercise of discretion vested in the judge by statute, in the absence of any evidence to sustain a contention that there was an abuse of such discretion, is not reviewable on appeal to this Court. The appeal must therefore be dismissed.

The contention of defendants that an examination of an adverse party, under C. S., 900 *et seq.,* cannot be joined with an order for an inspection of writings, in the possession or under the control of the party to be examined, is not sustained. Both statutes are remedial, and should be liberally construed to advance the remedy intended thereby to be afforded to the party to an action pending in the courts of this State. The rights of defendants upon such examinations as may be had, and upon the exercise of the right of inspection given to plaintiff by the order, may be amply protected by timely objections, and exceptions to rulings adverse to them.

Appeal dismissed.

SUDIE S. DOZIER v. D. R. LEARY AND WIFE, W. T. LEARY AND WIFE, ALFRED V. EVERETT AND ZILLIA EVERETT, HIS WIFE, AND J. E. OWENS AND WIFE.

(Filed 12 September, 1928.)

Bills and Notes—Negotiability and Transfer—Transfer without Endorsement.

Where a note, secured by a mortgage, is executed to husband and wife they hold title as tenants in common, and where a decree of partial divorce is granted, and the husband transfers his interest in the notes to his mother by a registered paper-writing, and there is evidence that the paper was signed in his handwriting, and the wife claims that certain money for the support of their children has not been paid: *Held,* in an action by the mother for one-half the proceeds of the note, the registered paper-writing is competent evidence of the transfer of interest, C. S., 3030, unless otherwise inadmissible, and the effect of the decree of divorce and the question of fraud between the assignor and assignee are matters to be presented in course of procedure, and a judgment of nonsuit should not be granted.

APPEAL by plaintiff from judgment of nonsuit rendered by *Barnhill, J.,* at May Term, 1928, of CURRITUCK. Reversed.

Aydlett & Simpson for appellant.
Ehringhaus & Hall for appellees.

ADAMS, J. The only question for decision is whether the trial court erroneously dismissed the action as in case of nonsuit.

On 20 December, 1923, D. R. Leary and W. T. Leary, with the joinder of their wives, executed and delivered to Alfred V. Everett and his wife, Zillia Everett, a mortgage on certain real estate to secure two notes amounting to $2,150, one of which was payable 1 January, 1926, and the other 1 January, 1927. Bearing even date is another mortgage on this land which the same mortgagors executed to J. E. Owens and his wife to secure a note for $850 maturing on the first day of January, 1925. Zillia Everett having obtained a decree for partial divorce is not living with her husband. The plaintiff, who is the mother of Alfred V. Everett, alleged that he had assigned to her all his right, title, and interest in the two notes for $2,150; that she owned a one-half interest therein; that Zillia Everett, the owner of the remaining interest, had the notes in her possession; and that the plaintiff was entitled to a sale of the mortgaged premises and to payment out of the proceeds of her interest in the secured notes.

Since it is admitted that the note executed to J. E. Owens and his wife has been paid they have no further interest in the controversy; and as D. R. Leary and W. T. Leary, upon alleging in their answer that they were ready and able to pay their notes as soon as the title thereto should be determined, were permitted by an order of court to pay the full amount of their indebtedness into the office of the clerk and thereupon to be discharged from further liability, they likewise have no interest in the ultimate result of the plaintiff's contention. It was admitted that the notes in question were made to Alfred V. Everett and his wife Zillia. As an estate by entireties in personal property is not recognized in our law these payees held title to the notes as tenants in common. *Winchester v. Cutler,* 194 N. C., 698; *Turlington v. Lucas,* 186 N. C., 283. Indeed, in her answer Zillia Everett admitted that she and her husband had held the notes as joint owners, but alleged that under the decree granting her partial divorce he was required to provide for the support of his children, and that execution had been issued and a lien had been acquired upon his interest in the notes. There was no evidence, however, to this effect, judgment of nonsuit having been granted at the conclusion of the plaintiff's evidence. All the admissions in the pleadings were introduced, and in the absence of evidence tending to show that Zillia Everett had any interest in the notes other than that of a tenant in common she cannot contest her husband's right to dispose of his interest. Under these circumstances the parties chiefly interested are the plaintiff and her son, the assignor. The plaintiff offered in evidence a written instrument purporting to have been signed by Alfred V. Everett in which he "does agree and sell to the plaintiff for the sum of nine hundred dollars all intress and money due him" on the notes. This paper was registered, and if it be conceded that its registration was not authorized by law or that the probate was insufficient, there was other evidence, nevertheless, which tended to prove that the signature was in Alfred's handwriting; so as between the parties the instrument would have been competent evidence unless otherwise inadmissible. Its introduction was resisted, we presume, on the latter ground. True, it contains a provision that the plaintiff "agrees in case of death return to Alfred V. Everett her son the seller, all money, moorgue and notes"; but these two parties are living and Alfred does not resist the plaintiff's recovery. The interest, if any, which the next of kin would have in the event of the plaintiff's death involves a question not embraced in the record. Moreover, though the paper is dated 16 October, 1925, the plaintiff, according to her testimony, purchased her son's interest in the notes on 1 January, 1925, and made the last payment of $450 before the alleged assignment was executed. When suit was brought the notes were held by Zillia Everett. Alfred therefore did not transfer his interest in the notes by endorsement, but endorsement is not the only mode by which such an interest may be assigned. C. S., 3030. Considering the evidence in the light most favorable to the plaintiff we conclude that his Honor inadvertently dismissed the action. The effect of the decree in the suit for divorce and the question of fraud between the assignor and the assignee of the notes are matters which must be presented in the orderly course of procedure. The judgment of nonsuit is

Reversed.

J. R. NEWBERN v. WESTERN UNION TELEGRAPH CO.

(Filed 12 September, 1928.)

Appeal and Error—Determination and Disposition of Cause— Proceedings in Lower Court After Remand—Law of the Case.

Where it plainly appears from the pleadings, records and briefs on a former appeal to an opinion of the Supreme Court that all matters involved therein had been decided adversely to the appellant except one upon which a new trial had been ordered, the decision thereon is the law of the case and will not be considered again upon a second appeal involving them.

CIVIL ACTION, before *Clayton Moore, Special Judge,* at June Term, 1928, of PASQUOTANK.

The plaintiff brought an action against the defendant for damages for negligence in the transmission of a telegram for the sale of sweet potatoes.

Issues of negligence, contributory negligence, notice and damages were submitted to the jury and answered in favor of the plaintiff. The jury awarded $500.00 damages. From judgment upon the verdict the defendant appealed.

Aydlett & Simpson for plaintiff.
C. W. Tillett, Thompson & Wilson for defendant.

BROGDEN, J. This cause was considered by the Court, on a former appeal, from a judgment of nonsuit, and is reported in 195 N. C., 258, where the facts are fully set out. The questions then presented to this Court for consideration were thus stated: "The defendant denied negligence and set up: (1) the plea of contributory negligence; and (2), that the plaintiff failed to present his claim for damages in writing within sixty days after the alleged message was filed for transmission." In the former opinion the Court declares: "We think the court below was in error in sustaining defendant's motion for judgment as in case of nonsuit under C. S., 567 . . . We do not repeat or discuss the evidence as the case goes back to the court below to be tried on the issue arising on the pleadings."

The pleadings in the former case are identical with those in the case at bar and raise issues of negligence, contributory negligence, notice and damages. While the opinion discussed the aspect of notice only, a consideration of all that was set out in the former appeal clearly indicates that the Court was of the opinion, and so decided that the case should be submitted to the jury upon its merits and upon all issues arising upon the pleadings. This conclusion is fortified by the fact that defendant's brief in the former appeal specifically urged the contributory negligence of plaintiff as a bar to his right of recovery, because such contributory negligence "was the proximate cause of the alleged damages." Authority was cited in support of the position so taken by the defendant. The former opinion therefore becomes the law of the case; that is to say, "a decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Ray v. Veneer Co.,* 188 N. C., 414, 124 S. E., 756; *Mfg. Co. v. Hodgins,* 192 N. C., 577, 135 S. E., 466.

The evidence tending to show that the plaintiff delivered to the carrier sweet potatoes, as specified in the contract, was uncertain, weak and hazy, and the jury might well have found that the plaintiff had not delivered potatoes of the quality specified in the contract of purchase. However, upon a close examination of the testimony in a light most favorable to the plaintiff, we cannot say that there was no evidence of such delivery.

No error.

JOHN A. MAYO v. COMMISSIONERS OF BEAUFORT COUNTY.

(Filed 12 September, 1928.)

Taxation—Constitutional Requirements and Restrictions—Right of Counties to Issue Bonds Without Approval of Voters under County Finance Act.

Under the provisions of the Municipal Finance Act, ch. 81, Public Laws of 1927, by proceedings duly had under proper resolution, a county may issue bonds for funding valid and binding obligations incurred prior to 1 July, 1927, for the necessary expenses of the county.

APPEAL by plaintiff from *Small, J.,* at Chambers, Elizabeth City, 8 August, 1928. From BEAUFORT.

Civil action to determine the validity of certain proposed bonds of Beaufort County.

At the regular August, 1928, meeting of the board of commissioners of Beaufort County, a resolution was duly adopted, agreeably to the provisions of chapter 81, Public Laws of 1927, authorizing the issuance of Beaufort County bonds in the sum of $125,000.00 for the purpose of funding the outstanding indebtedness of said county, exclusive of school indebtedness, incurred prior to 1 July, 1927, which said indebtedness was contracted for the necessary expenses of the county.

From a judgment sustaining a demurrer to the complaint and holding the bonds in question to be valid obligations of Beaufort County and denying the prayer for injunctive relief, the plaintiff appeals, assigning error.

S. M. Blount for plaintiff.
Harry McMullan for defendants.

STACY, C. J. As the bonds in question are to be issued in accordance with the provisions of the County Finance Act, chapter 81, Public Laws 1927, for the purpose of funding valid and binding obligations of Beaufort County, incurred prior to 1 July, 1927, for the necessary expenses of the county, the special county purposes appearing from resolutions duly adopted, it is difficult to perceive upon what ground the bonds may be successfully assailed in view of our holdings in *Commissioners of McDowell v. Assell,* 194 N. C., 412, 140 S. E., 34, affirmed on rehearing, 195 N. C., 719, 143 S. E., 474, and *R. R. v. Cherokee County,* 195 N. C., 756, 143 S. E., 467. On authority of the holdings in these cases, the judgment in the instant case must be upheld.

Affirmed.

STATE v. LARRY NEWSOME.

(Filed 12 September, 1928.)

Criminal Law—Appeal and Error—Prosecution of Appeal under Rules of Court.

An appeal *in forma pauperis* by a defendant convicted of a capital felony will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating appeals, after an examination of the record for errors appearing on its face.

Motion by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. This was a criminal prosecution tried upon an indictment found by a grand jury of Wayne County, December Term, 1927, (*S. v. Newsome,* 195 N. C., 552, 143 S. E., 187), charging the prisoner with murder in the first degree, and later removed to Chatham County for trial which was held at the June Term, 1928, Superior Court of said county, and resulted in a conviction and sentence of death. From the verdict thus rendered and judgment entered thereon, the defendant gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules, albeit the prisoner was allowed to appeal *in forma pauperis. S. v. Taylor,* 194 N. C., 738, 140 S. E., 728. The motion of the Attorney-General to docket and dismiss the appeal must be allowed. *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881. But this we do only after an examination of the case to see that no error appears on the face of the record, as the life of the prisoner is involved. *S. v. Clyburn,* 195 N. C., 618, 143 S. E., 129; *S. v. Thomas,* 195 N. C., 458, 142 S. E., 474; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

We find no error on the present record.

Appeal dismissed.

THOMAS HAILEY v. CITY OF WINSTON-SALEM ET AL.

(Filed 12 September, 1928.)

1. **Taxation—Constitutional Requirements and Restrictions—Submission to Voters—Municipal Corporations—Cities—Schools.**

Where the charter of a city requires the board of aldermen to establish, maintain and support a system of public schools, and to appropriate annually for this purpose a certain part of the taxes of the city, and to fix the amount of the appropriation, and the charter does not provide for the submitting to the qualified voters the question of levying a tax for schools, the omission in the act to expressly provide for holding the necessary election will not invalidate bonds issued by the city for this purpose when the question has been submitted to and approved by the voters in an election held under general election laws, the power given to the city to maintain schools also giving the implied power to hold the necessary election. Const., Art. VII, sec. 7.

2. **Municipal Corporations—Territorial Extent, Annexation—Vote of Those Annexed by Enlargement of City Limits Not Necessary—Constitutional Law—Schools.**

Where by special act the Legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to the Constitution, Art. VII, sec. 7, that a vote of the people within the added territory be had either upon the question of annexing such territory upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools.

3. Same—Enlarging City Limits Not Special Act Changing Lines of School Districts.

Where the Legislature grants a charter to an existing city enlarging the city limits to take in territory within a school district, the municipality takes control of all matters over which it is given authority, to the exclusion of other governmental agencies, but this result is not in conflict with Art. II, sec. 29, of the Constitution, prohibiting the Legislature from passing any local, private or special act establishing or changing the lines of school districts; any change in existing school districts which may result being merely incidental to the main purpose of investing the inhabitants of the city with control of all municipal matters.

4. Municipal Corporations—Governmental Powers and Functions—Power of City to Maintain Schools.

The power given by C. S., 2832 (Art. 16) to "any city" to acquire, establish and operate schools applies to any city whether or not it has adopted a plan of government under C. S., ch. 56.

5. Same—Municipal Purpose.

Where a city is required by statute to establish, maintain, support, etc., its public schools: *Held,* necessary buildings are an integral factor in the maintenance of the school system, and their construction is a municipal purpose.

APPEAL by plaintiff from a judgment of *MacRae, Special Judge,* rendered at May Term, 1928, of FORSYTH, on submission of controversy without action under C. S., 626 *et seq.* Affirmed.

The plaintiff is a resident and taxpayer of the city of Winston-Salem, which is a municipal corporation. The city, the members of the board of aldermen, the mayor, and the secretary-treasurer of the city are the defendants. The material facts are set forth in the agreed case as follows:

3. The defendants are about to issue bonds, of the aggregate face amount of $2,500,000, of the city of Winston-Salem, pursuant to the provisions of the Municipal Finance Act, 1921, of North Carolina, constituting chapter 106 of the Public Laws of 1921, Extraordinary Session of North Carolina, as amended, for the purpose of acquiring, constructing, reconstructing and enlarging public school buildings in and for the city of Winston-Salem, and acquiring and developing lands for such school buildings and acquiring original furnishings, equipment and apparatus therefor.

4. An ordinance authorizing the issuance of said bonds was introduced and adopted at a meeting of the board of aldermen of the city of Winston-Salem, held on 20 January, 1928. A copy of said ordinance, marked Exhibit "A," is hereto annexed and made a part of this agreed

case. An ordinance calling a special election on the question of issuing said bonds was introduced and adopted by said board on 20 January, 1928. A copy of said ordinance, marked Exhibit "B," is hereto annexed and made a part of this agreed case. At said election held pursuant to said ordinance, on 6 March, 1928, 1,966 votes were cast in favor of the issuance of said bonds and 11 votes were cast against the issuance of said bonds. The total number of persons qualified to vote at said election, as shown by the registration-books, was 2,246. Said board of aldermen has canvassed the returns of said election and has judicially determined and declared the result of said election. A copy of the minutes of said board of aldermen, marked Exhibit "C," is hereto annexed and made a part of this agreed case.

5. The city of Winston-Salem as now constituted exists and is organized pursuant to and in accordance with chapter 232 of the Private Laws of 1927, which was ratified and took effect on 3 March, 1927. Previous to the enactment of said chapter 232 of the Private Laws of 1927, said city had existed and been organized pursuant to and in accordance with chapter 180 of the Private Laws of 1915, and the acts amendatory thereof and supplemental thereto. Section 2 of said chapter 232 of the Private Laws of 1927 sets forth the corporate boundary lines of said city. The territory included within said corporate boundary lines embraces territory which was not included within the corporate boundary lines of said city as set forth in said chapter 180 of the Private Laws of 1915, and said territory not embraced within said corporate boundary lines as set forth in said chapter 180 of the Private Laws of 1915 was added to and made a part of said city either by special or local acts of the General Assembly of North Carolina passed subsequent to the enactment of said chapter 180 of the Private Laws of 1915 or by said chapter 232 of the Private Laws of 1927. A substantial portion of said added territory was added to and made a part of said city by special or local acts enacted since 10 January, 1917. Of such territory added since 10 January, 1917, a portion was at the time of its annexation to said city a part of one or more nonlocal tax school districts and a portion was a part of one or more local tax school districts, under the control of the county board of education of Forsyth County. No portion of said territory annexed to said city since 10 January, 1917, was at the time of its annexation a part of any special charter school district.

6. Both chapter 180 of the Private Laws of 1915 and chapter 232 of the Private Laws of 1927 provide that the board of aldermen of the city of Winston-Salem "shall provide for the establishment, continuance, maintenance and support of a system of public schools, and for this purpose shall annually appropriate a certain part of the taxes of the city."

The plaintiff prayed that the defendants be enjoined from issuing the proposed bonds and that he recover his cost. The prayer was denied, the court adjudging that the defendants be not restrained or enjoined and that they recover their costs. The plaintiff excepted and appealed.

Richmond Rucker for plaintiff.
Fred M. Parrish for defendants.

ADAMS, J. At the session of 1927 the General Assembly amended the charter of Winston-Salem, defined the corporate limits of the city, and provided for its government. Private Laws 1927, ch. 232. In section 45 the board of aldermen is required to make provision for the establishment, continuance, maintenance, and support of a system of public schools; to appropriate annually for this purpose a certain part of the taxes of the city, and to ascertain and fix the amount of the appropriation. The substance of these provisions was included in the charter of 1915. Private Laws 1915, ch. 180. The appellant says that section 45 is in conflict with Article VII, sec. 7, of the Constitution, and therefore inoperative for the reason that the maintenance of schools is not a necessary expense *(Hollowell v. Borden,* 148 N. C., 255); that the charter contains no provision for submitting to the qualified voters of the city the question of levying a tax for schools, and that the omission of such a requirement invalidates that part of the section which purports to authorize the levy. His deduction is that as no means is provided for the exercise of the power, the power itself must fail. To support this proposition he cites *Gastonia v. Bank,* 165 N. C., 507.

In that case the decisive fact was that the Legislature had enacted a law which upon its face, without providing for a vote of the people, authorized the aldermen of Gastonia to issue bonds for improving the streets, etc., and for erecting graded school buildings; and the Court held that as the erection of school buildings is not a necessary expense, so much of the act as authorized the sale of bonds for this purpose was invalid because the act did not require submission of the question to the qualified voters. No election had been held and the will of the voters had not been ascertained. But in the case at bar an election was duly conducted and the qualified voters with substantial unanimity approved the issuance of bonds. The language used in *Gastonia v. Bank, supra,* is not to be given a strictly literal meaning; it must be considered in connection with other decisions. For example, in *Bank v. Comrs.,* 116 N. C., 339, 363, it was insisted that it is as essential to the validity of bonds that the Legislature in express terms should authorize the election and specifically require the votes of a majority of the qualified voters as that it should authorize financial aid from the town. Disapproving this contention the Court remarked: "It is admitted to be an essential prerequisite to the validity of such bonds that the Legislature should grant the power to aid, and that the majority of the qualified voters should signify their approval by their ballots cast. The machinery for ascertaining the will of the electors is a secondary consideration. The main purpose was to prohibit the imposition of a tax for certain objects without the assent of a majority of the qualified voters. . . . Where legislative sanction is given and the will of the majority of qualified voters is actually ascertained, it is certain that the danger line has not been crossed, so as to wrongfully subject municipalities to the burden of a debt for any purpose except necessary expenses. The imperative requirement of the Constitution is that there shall be a concurrence of the legislative and the popular will, the former evidenced by a grant of authority to vote, the latter by the record that a majority of the qualified voters have cast the ballots in favor of creating the debt. Whether the legislative purpose is expressed or may be fairly implied from the language of the statute, is immaterial (1 Dillon, *supra,* sec. 89 (55); *Clark v. Des Moines,* 87 Am. Dec., 423), as is the question whether the election is conducted under statutes passed for the particular purpose, or, in the absence of such special provision, under the general election law enacted for the town or for counties generally, so that the sense of the voters is unquestionably and fairly ascertained. The power to subscribe being given, the fair implication was that the Legislature intended that the use of the machinery provided generally for taking a vote to authorize the borrowing of money might be used. The principle of strict construction is never 'carried to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment.' If the special provision for holding an election in a town or county fails to provide in detail the mode or what is in common parlance called the machinery for conducting it, it must be inferred that the Legislature intended that general election laws might be resorted to, to fill in the hiatus, and not that the legislative will should be thwarted or defeated by any such omission."

The Municipal Finance Act expressly confers upon cities and towns the power to issue their negotiable bonds for any purpose for which they may raise or appropriate money, except for current expenses (3 C. S., 2937), and it impliedly confers the power to hold the necessary election. It is the machinery which is of "secondary consideration." The simple omission from the act of an express provision for holding an election cannot defeat the will of the qualified voters expressed in the manner prescribed under an implied power conferred by the law.

The plaintiff's second position is this: that the charter of the city conflicts with Art. VII, sec. 7, because it attempts to annex to the city the territory of one or more nonlocal tax districts without permitting the voters in the annexed territory to vote either upon the question of annexing such territory or upon the question of levying school taxes therein. We may avoid confusion on this point by keeping in mind the distinction between statutes which control in the creation and consolidation of school districts and legislative authority to enlarge the boundaries of a municipal corporation. In *Coble v. Comrs.*, 184 N. C., 342, we adverted to the distinction, saying that if the corporate limits are extended the inhabitants of the annexed territory, regardless of their will, must share the burdens of the entire municipality. Dillon on Municipal Corporations, Vol. 1, sec. 106. The object of the charter is to provide for the government, welfare and improvement of the city and not exclusively or primarily for the mere maintenance of schools. In our opinion the two objections set forth under the first assignment of error are without substantial merit and should be overruled.

It is contended that the charter is at variance with Article II, section 29, of the Constitution which declares, "The General Assembly shall not pass any local, private, or special act or resolution . . . establishing or changing the lines of school districts." We regard it as obvious that the incorporation of the city of Winston-Salem is not synonymous with the creation of a school district within the meaning of this section of the Constitution. The word "district" as used in the public school law is defined in 3 C. S., 5387. The definition was probably framed in view of the distinction between school districts and taxing districts. *Coble v. Comrs., supra.* Art. II, sec. 29, applies to the former but not to the latter. *Harrington v. Comrs.*, 189 N. C., 572. As a rule school districts are created by the county board of education. C. S., 5480. It is true that the boundaries of a "district" may be coterminous with those of a city or town (3 C. S., 5387), but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the constitutional provision. Here the annexed territory was added to and made a part of the city by special or local acts of the Legislature and not by the board of aldermen upon petition of the voters. When a new governmental agency is established by the Legislature, such as a municipal corporation, it takes control of all the affairs over which it is given authority, to the exclusion of other governmental agencies. *Gunter v. Sanford,* 186 N. C., 452. The primary purpose of the Legislature in granting the charter was to invest the inhabitants of the city with the control of all matters of municipal concern. The charter does not purport to deal with the question of establishing a special charter district or any other district mentioned in 3 C. S., 5387, or with the question of changing the lines of school districts; and any change that may have been made in this respect was a mere incident in the accomplishment of the primary purpose of the Legislature. The decision in *Brown v. Comrs.,* 173 N. C., 598, has direct bearing upon this question. There it is said that the framers of this amendment (Art. II, sec. 29) no doubt intended to leave intact the long recognized and salutary power of the Legislature to supervise and control the financial affairs of the municipalities of the State, and that as the bond issue was the direct object of the legislative act, a provision that the proceeds of the bonds should be used for road purposes did not bring the act within the prohibition of the constitutional amendment. This case and the authorities therein cited present cogent reasoning against the appellant's position.

It is provided in C. S., 2832 (Art. 16) that any city shall have the right to acquire, establish, and operate . . . schools. The appellant contends that this section is not available to the defendant for the reason that section 2786 (Art. 15) declares that all the provisions of Article 15 shall apply to all cities and towns whether they have or have not adopted a plan of government under C. S., ch. 56, and that this provision necessarily implies that the power granted by section 2832 relates only to cities and towns which have adopted such a plan. That the latter section applies, as in express words it declares, to "any city," seems to have been assumed in *Henderson v. Wilmington,* 191 N. C., 269, and the conclusion that it should be so applied is in accord with our construction of the statute. The bonds are not to be used in the maintenance of schools partly within and partly without the city, and for this reason *Hood v. Sutton,* 175 N. C., 98, is not in point.

The appellant takes the additional position that the erection of buildings for schools is not a municipal purpose for which the Legislature may authorize a city to issue bonds. The grant of power to acquire, establish, and operate schools (sec. 2832) is by implication the grant of such power as is necessary to exercise the power expressly granted. This section is at least permissive, but the charter of the city is mandatory: "the board of aldermen shall provide for the establishment, continuance, maintenance, and support of a system of public schools." This mandate and the express direction that the board shall annually appropriate a part of the city taxes for the designated purpose manifestly contemplate the acquisition or erection of such buildings as may be necessary for the continuance and maintenance of the schools. Necessary buildings are an integral factor in the maintenance of the school system and their construction under the facts here presented is clearly a municipal purpose. It is not necessary to review the numerous cases which are cited in the brief of the appellees as having direct relation to the subject. The judgment is

Affirmed.

SAVINGS BANK AND TRUST COMPANY ET AL. v. C. H. BROCK AND E. F. AYDLETT, TRUSTEE.

(Filed 12 September, 1928.)

1. **Mortgages—Construction and Operation—Parties Secured.**
   Where contemporaneously with a deed to lands a purchase-money mortgage or deed of trust is given to the grantor the title passes *eo instanti* to the mortgagee or trustee for the security of the note to which the deed is secondary, and this right attaches in favor of a third person who under agreement of the parties advances the money for the payment of the purchase price to the amount of the money so advanced by him.
2. **Mortgages—Construction and Operation—Lien and Priority—Registration.**
   A purchase-money mortgage given simultaneously with a deed to lands is regarded as but a single transaction and vests the equity of redemption in the grantee of the deed subject to the security title of the grantor, and does not require registration except as to purchasers for value and creditors of the grantor in the deed.

APPEAL by defendants from *Barnhill, J.*, at May Term, 1928, of CURRITUCK. No error.

Civil action to have deed of trust executed by P. T. Owens to H. G. Kramer, trustee, declared a first lien on land described in the complaint, prior to the lien of a deed of trust subsequently executed by the said P. T. Owens to E. F. Aydlett, trustee, upon the ground that the consideration for the note secured by the deed of trust to Kramer, trustee, was in part purchase money for the land conveyed thereby and for other relief. The deed of trust to Aydlett, trustee, although subsequently executed, was registered prior to the deed of trust to Kramer, trustee. Both deeds of trust were registered prior to the registration of the deed under which P. T. Owens, the grantor, derived title to the said land.

From judgment upon admissions in the pleadings, and upon the verdict, declaring that the deed of trust to Kramer, trustee, has priority over the deed of trust to Aydlett, trustee, defendants appealed to the Supreme Court.

McMullan & LeRoy for plaintiffs.
Ehringhaus & Hall for defendants.

CONNOR, J. Some time prior to 26 November, 1924, P. T. Owens, a resident of Currituck County, North Carolina, entered into negotiations with defendant, C. H. Brock, a resident of Elizabeth City, in Pasquotank County, North Carolina, for the purchase of land situate in Currituck County, and owned by the said Brock. The said Brock agreed to sell the said land to the said Owens, for the sum of $10,000, the said purchase price to be paid in cash, upon delivery of the deed conveying the said land from the said Brock to the said Owens.

Thereafter, upon the application of the said P. T. Owens, the plaintiff, Savings Bank and Trust Company, agreed to lend to the said Owens the sum of $10,000, to be applied by him in payment of the purchase price for the land which the said Brock had agreed to sell and convey to the said Owens. It was agreed by and between the said Owens and the said plaintiff, that the said loan should be secured by a first mortgage or deed of trust on the land to be conveyed to the said Owens by the said Brock, and on other lands then owned by the father of the said Owens. It was also agreed that a note for the sum of $15,000 should be executed by the said Owens, payable to plaintiff, Savings Bank and Trust Company, and that said note, executed by the said Owens as principal, and his father as surety, and endorsed by certain named persons, should be secured by a deed of trust to H. G. Kramer, trustee. It was agreed that the consideration for this note should be (1) the loan of $10,000, to be applied by Owens to the payment of the purchase price for the land, which was to be conveyed to him by defendant, C. H. Brock, and (2) the loan of $5,000, to be applied by Owens to the payment of his note, for said amount, then held by said Savings Bank and Trust Company.

Pursuant to this agreement the said note and deed of trust, both dated 26 November, 1924, were drawn. Both were duly executed and delivered on 2 December, 1924, in Elizabeth City. Contemporaneously with the delivery of said note and deed of trust, the said C. H. Brock delivered to the said P. T. Owens a deed conveying to him the land described in the complaint. Thereupon the said P. T. Owens delivered to the said Brock his check for $10,000, drawn on the plaintiff Savings Bank and Trust Company, in payment of the purchase price for the land conveyed by the deed from C. H. Brock to P. T. Owens and by the deed of trust from P. T. Owens to H. G. Kramer, trustee. This check was paid by the plaintiff, Savings Bank and Trust Company, out of the proceeds of the note secured by said deed of trust. At the time C. H. Brock received the check from P. T. Owens, and at the time the said check was paid by the Savings Bank and Trust Company, C. H. Brock knew that P. T. Owens had procured a loan from the Savings Bank and Trust Company, with which to pay the purchase price for the land, upon the agreement that said loan should be secured by a first mortgage or deed of trust on the land.

Thereafter, pursuant to an agreement entered into by and between P. T. Owens and C. H. Brock, on 2 December, 1924, the date of the transaction by which the land was conveyed by Brock to Owens, and by

Owens to Kramer, trustee, to wit, on 9 December, 1924, P. T. Owens delivered to C. H. Brock a deed of trust executed by P. T. Owens and his wife, by which the land was conveyed to defendant, E. F. Aydlett, trustee, to secure a note theretofore executed by P. T. Owens and payable to C. H. Brock, for the sum of $3,098.38.

The deed by which the land was conveyed by C. H. Brock to P. T. Owens was dated, executed and acknowledged on 2 December, 1924; it was delivered by Brock to Owens on the same day; it was probated by the clerk of the Superior Court of Currituck County, and filed for registration with the register of deeds of said county on 27 December, 1924.

The deed of trust from P. T. Owens to H. G. Kramer, trustee, securing the note for $15,000 to the Savings Bank and Trust Company, dated 26 November, 1924, was executed, acknowledged and delivered on 2 December, 1924; it was probated by the clerk of the Superior Court of Currituck County and filed for registration with the register of deeds of said county on 15 December, 1924, twelve days prior to the registration of the deed from C. H. Brock to P. T. Owens, conveying to him the land described therein.

The deed of trust from P. T. Owens to E. F. Aydlett, trustee, securing the note for $3,098.38, to C. H. Brock, dated 2 December, 1924, was executed, acknowledged and delivered on 9 December, 1924; it was probated by the clerk of the Superior Court of Currituck County and filed for registration with the register of deeds of said county on 13 December, 1924, fourteen days prior to the registration of the deed from C. H. Brock to P. T. Owens, conveying to him the land described therein, and two days prior to the registration of the deed of trust from P. T. Owens to H. G. Kramer, trustee, securing the note to plaintiff, Savings Bank and Trust Company.

Upon the foregoing facts, admitted in the pleadings and established by the verdict, the court was of opinion "that the lien created by the deed of trust to Kramer, trustee, is superior to and has priority over the lien created by the said deed of trust to Aydlett, trustee, and that defendant Brock is estopped to dispute the priority of said lien."

It was therefore "ordered, decreed and adjudged that the plaintiffs (Savings Bank and Trust Company, and H. G. Kramer, trustee) are entitled to and have the first lien upon the property described in section two of the complaint, and in said deed from Brock to Owens." It was further ordered, decreed and adjudged that the land be sold, and that out of the proceeds of the sale, after the payment of the costs and expenses of the same, the sum of $10,000, with accrued interest, be paid to the plaintiff, Savings Bank and Trust Company, and that the balance, if any, be paid to defendant, C. H. Brock. Since the commencement of this action the deed of trust executed by P. T. Owens to E. F. Aydlett, trustee, has been foreclosed, by sale of the land described in the complaint, under the power of sale contained therein, and defendant, C. H. Brock, as the purchaser at said sale has become the owner of said land, subject to the lien, if any, of plaintiffs, by virtue of the deed of trust from Owens to Kramer, trustee.

In *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196, it is said by this Court that "it is generally held that when a vendor conveys property and simultaneously takes back a mortgage to secure the payment of all or a part of the purchase price, and such mortgage is at once registered, the title to the property conveyed does not rest in the purchaser for any appreciable length of time, but merely passes through his hands, without stopping and vests in the mortgagee. During such instantaneous passage no lien of any character held against the purchaser, dower or homestead right, can attach to the title superior to the right of the holder of the purchase-money mortgage." This principle is founded not upon any supposed equity favoring a purchase-money mortgagee, but "simply upon the ground that the two instruments, having been executed simultaneously are regarded in law as concurrent acts or as component parts of a single act."

The refusal of the court to allow defendants' motion for judgment as of nonsuit, and the judgment rendered upon the admissions and upon the verdict would be clearly supported by this principle, if the deed from Brock to Owens, and the deed of trust from Owens to Kramer, trustee, which were executed and delivered, concurrently, and as a single transaction, had been registered at the same time, and the deed of trust to Kramer, trustee, at least to the extent of the purchase money advanced by the plaintiff, Savings Bank and Trust Company, would be clearly superior to the deed of trust executed by Owens to Aydlett, trustee, to secure a preëxisting debt due by Owens to Brock. For the principle is applicable, not only where the vendor or grantor in the deed takes a mortgage or deed of trust to secure purchase money, but also where a third party advances the money to pay the purchase price for the land conveyed to the mortgagor, and takes a mortgage or deed of trust to secure such advances, contemporaneously with the execution and delivery of the deed. *Weil v. Casey,* 125 N. C., 356, 34 S. E., 506, 41 C. J., 531, sec. 472. The effect, therefore, of the deed from Brock to Owens, and of the deed of trust from Owens to Kramer, trustee—both, upon the facts appearing in the record, being component parts of a single act—was to vest the title to the land, theretofore owned by Brock, in Kramer, trustee, to secure the payment of so much of the amount of the note payable to Savings Bank and Trust Company as was advanced by the said Savings Bank and Trust Company and applied to the payment of the purchase price for the land conveyed by Brock to Owens.

The title which thus vested in Kramer, trustee, was good as against Brock, and those claiming under him, except as purchasers for value from or as creditors of the said Brock, without registration of the deed from Brock to Owens, and of the deed of trust from Owens to Kramer, trustee. *Proffit v. Insurance Co.,* 176 N. C., 680, 97 S. E., 635. No title rested in Owens, by reason of the deed to him from Brock delivered on 2 December, 1924, upon which a lien of any character, by reason of a docketed judgment against him or of a registered mortgage or deed of trust executed by him, could attach, superior to the lien upon the land for the purchase money, by reason of the deed of trust to Kramer, trustee. *Weil v. Casey, supra.* Although the deed from Brock to Owens, and the deed of trust from Owens to Kramer, trustee, were not registered prior to the registration of the deed of trust to Aydlett, trustee, securing the note executed by Owens and held by Brock, no lien was acquired upon the land by reason of the deed of trust from Owens to Aydlett, trustee, superior to the title which vested in Kramer, trustee, by reason of the deed of trust to him from Owens, which was executed and delivered contemporaneously with the execution and delivery of the deed from Brock to Owens. The Savings Bank and Trust Company, by reason of the title which vested in Kramer, trustee, has a lien on the land described in the complaint, for the amount loaned by said company to Owens, and applied by him to the payment of the purchase money for the land. This lien is superior to the lien created by the deed of trust from Owens to Aydlett, trustee, securing payment of the note to Brock.

Upon the registration of the deed from Brock to Owens on 27 December, 1924, the liens upon the land conveyed thereby to Owens, by reason of the deeds of trust theretofore executed by him, both of which had been previously registered, attached at once, and simultaneously, to the title which vested in Owens by reason of said deed. *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490. The title in Owens, however, was subject to the lien of the plaintiff, Savings Bank and Trust Company, for the purchase price for the land, by reason of the deed of trust to Kramer, trustee. This lien was superior to the lien of the defendant, Brock, by virtue of the deed of trust to Aydlett, trustee. Priority of registration did not determine priority of lien, upon the facts admitted in the pleadings and established by the verdict.

There is no error in the judgment based upon the holding that upon the facts on this record, the lien of the plaintiffs is superior to the lien of the defendants to the extent of the amount loaned by plaintiff, Savings Bank and Trust Company, to Owens and applied by him to the payment of the purchase price for the land conveyed by Brock, notwithstanding the order in which the respective deeds of trust were registered. Whether or not the defendant, C. H. Brock, is estopped, in the absence of fraud, from disputing the priority of the lien created by the deed of trust to Kramer, trustee, over the deed of trust to Aydlett, trustee, under which he claims, need not be decided. It is well settled in this State that no notice, however full and formal of the prior execution of a deed, a mortgage or deed of trust, which has not been duly registered, will dispense with such notice by registration. The uniform and insistent enforcement of this principle is essential to the preservation of the integrity of our statutes relative to registration of deeds, mortgages and deeds of trust. It, however, has no application upon the facts on this record. The judgment is affirmed. There is

No error.

WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR C. T. A. OF A. L. STEVENSON, v. JOE STEVENSON ET AL.

(Filed 12 September, 1928.)

Wills—Construction—Estates and Interests Created.

A devise and bequest of testator's real and personal property to his wife for life, with direction that at her death the entire estate be converted into cash and the proceeds go in remainder to his and her brothers and sisters if living, and if not, to their legal representatives: *Held,* the contingency upon which the funds in remainder vests is the death of the life tenant, the brothers and sisters of the testator and his wife living at the termination of the life estate taking per capita and the legal representatives of those who had previously died taking *per stirpes.*

BROGDEN, J., concurring.

APPEAL by Joe Stevenson and J. C. Salley, defendants, from *Stack, J.,* at November Term, 1927, of FORSYTH. Affirmed.

W. L. Wilson, O. E. Snow, W. R. Badgett, Geo. C. Sweeten, Graves & Graves and F. L. Webster for appellants.

Geo. O. Hege for R. C. Wrights and Will Wrights, and C. Reade Johnson for T. W. Terry.

Efird & Liipfert and Raper & Raper for J. J. Mock.

ADAMS, J. A. L. Stevenson died on 17 February, 1925, leaving a will which thereafter was duly admitted to probate in Forsyth County. He left surviving him a widow, now deceased, but no children. The plaintiff is the administrator of his estate, with the will annexed; the defendants are legatees and devisees or distributees and heirs at law of the testator and of his deceased wife. The suit is prosecuted as an application to a court of chancery for the purpose of determining and identifying the beneficiaries described in the fifth item of the will. *Freeman v. Cook,* 41 N. C., 373; *Alsbrook v. Reid,* 89 N. C., 151; *Bank v. Alexander,* 188 N. C., 667; *Ernul v. Ernul,* 191 N. C., 347; *Bank v. Edwards,* 193 N. C., 118.

Items 1 and 5 are as follows:

Item 1. I will and devise to my beloved wife, Emma A. Stevenson, all my real estate and personal property of every description whatsoever to have and use the same during her natural lifetime with full power to dispose of such real estate and personal property or money as may be necessary for her comfortable maintenance and support, except such disposition of my property as is hereinafter made and set out in this will.

Item 5. At the death of my wife I will and devise that my entire estate, real and personal, be converted into cash, and after the payment hereinbefore enumerated, that is $2,000 to the Board of Provincial Elders of the Moravian Church and the further sum of $2,500 to be paid to the Board of Trustees of the 4th Street Christian Church, that all the funds arising from said sale be distributed as follows: To my brothers and sisters, if living, if not living, to their legal representatives; to the brothers and sisters of my wife if living, or if not living to their legal representatives.

In construing the fifth item the trial judge held that it was the intention of the testator that all the property therein described should be converted into cash and that the proceeds, after deduction of the payments therein directed, should be distributed per capita among the living brothers and sisters both of the testator and of his deceased wife and *per stirpes* among the legal representatives of the deceased brothers and sisters of the testator and of his deceased wife. Joe Stevenson and J. C. Salley, respectively a brother and a sister of the testator, excepted and appealed. It will be seen, therefore, that the question is whether the judgment shall be affirmed or whether under the terms of item 5 the living brother and the living sister of the testator are entitled to all the property in controversy.

As the first item passes a life estate *(Carroll v. Herring,* 180 N. C., 369), it is necessary to inquire whether the limitation after the life estate set out in item five is vested or contingent—that is, whether the "brothers and sisters" or "their legal representatives" are determinable at the death of the testator or at the death of the life tenant; and the answer depends upon the question whether the words "if living" relate to the first of these events or to the second. If the words of survivorship are to be referred to the death of the testator, the remainder is vested; if they are to be referred to the death of the life tenant the remainder is contingent. In *Cripps v. Wolcot,* 56 Eng. Reports, 613, it was said that if no special intent be found in the will the survivorship will be referred to the period of division; that if no previous interest is given, the period of division is the death of the testator and the survivors at his death will take the whole legacy; but if a previous life estate is given the period of division is the death of the life tenant and the survivors at such death will take the whole legacy—the enunciation of a principle which has often been applied in our own decisions. *Jourdan v. Green,* 16 N. C., 271; *Knight v. Knight,* 56 N. C., 167; *Vass v. Freeman, ibid.,* 221; *Britton v. Miller,* 63 N. C., 268; *Robinson v. McDiarmid,* 87 N. C., 455; *Wise v. Leonhardt,* 128 N. C., 289; *Jenkins v. Lambeth,* 172 N. C., 466.

The clause construed in *Witty v. Witty,* 184 N. C., 375, contained a devise of land to the testator's wife for life, with a provision that in the event of the wife's death or of her second marriage the devised land should be sold by public auction to the highest bidder and the proceeds divided among the testator's heirs. It was held that the will imported a division among those who were the heirs of the testator at his death, though they were not to enjoy the actual possession during the lifetime of the mother. The opinion, however, points out the distinction between the clause therein construed and devises in which the testator vests the ulterior disposition after a particular estate in persons surviving or living at the death of the first taker, or in which he indicates a purpose to postpone the limitation until the expiration of the particular estate.

In *Gill v. Weaver,* 21 N. C., 41, the facts were that the testator had given his property to his wife for her sole use until his youngest living child should be of age, provided his wife lived. If she died before the youngest child was of age the property was to be divided among all his living children, with one exception, and if she lived until the event occurred she was to have an equal share of the estate. It was held that the testator had put the wife and the children on the same footing and that the share of a daughter who had died pending the event did not survive to her personal representative. In a later case *(Sanderlin v. Deford,* 47 N. C., 75) the principle was applied to contingent remaindermen who represented a class. It was intimated, if not decided, that where the gift is to children who shall survive a given event the death of any child pending the contingency has the effect of striking the name of the deceased child out of the class of presumptive objects, so that such an interest could not devolve upon the deceased child's representatives. *Gill v. Weaver, supra,* is cited as authority for this position, but in that case *Ruffin, C. J.,* remarked that the testator had forgotten to provide for the death of a child leaving issue—the very event for which, it is contended, the testator provided in the case at bar. So it has been held that a legacy to the children of A. is a gift to the children *in esse* at the death of the testator, and that a legacy to a class subject to a life estate vests in the persons composing the class at the testator's death, not absolutely, but subject to be opened so as to make room for all persons composing the class not only at the testator's death, but at the falling in of the intervening estate. *Mason v. White,* 53 N. C., 421; *Biddle v. Hoyt,* 54 N. C., 160; *Hawkins v. Everett,* 58 N. C., 42; *Chambers v. Payne,* 59 N. C., 276; *Lumber Co. v. Herrington,* 183 N. C., 85.

Considered in the light of these decisions the words "if living," in the fifth item of the will, are manifestly referable to the death of the life tenant. *Jessup v. Nixon,* 193 N. C., 640; *Knight v. Knight, supra.* The remaining question is whether the survivors of the class take the devised property or whether the interest of any deceased member of the class passes to his legal representatives. The answer is given in *Mercer v. Downs,* 191 N. C., 203. There the devise was in these words: "I give and devise to my beloved wife, Rosa M. Mercer, the tract of land on which I now reside, containing five hundred acres, more or less, for her lifetime, and at her death to go to our surviving children or their heirs." It was held that the testator had in mind the possibility that one or more of his children might die during the lifetime of his wife and provided for such contingency by giving the share of such deceased child to his or her heirs; and that if any child should die before the mother the remainder to such child would be at an end and another remainder to the heirs would be substituted therefor, the remainderman thus substituted taking directly from the devisor and therefore by purchase and not by descent. This principle controls in the disposition of the present appeal. As we construe the fifth item the testator intended that the "funds arising from the sale" should be distributed per capita among such of his own brothers and sisters and those of his wife as were living, and *per stirpes* among the legal representatives of such as were deceased, at the termination of the particular estate. The judgment is

Affirmed.

BROGDEN, J., concurring: The decisions are to the effect that where an ultimate estate in expectancy is limited to a class of persons, to take effect upon the happening of a contingency, and there are persons *in esse* answering the description when the contingency happens, the law immediately calls the roll of the class, and those who answer, alone can take. *Gill v. Weaver,* 21 N. C., 41; *Sanderlin v. Deford,* 47 N. C., 74; *Knight v. Knight,* 56 N. C., 167; *Hawkins v. Everett,* 58 N. C., 42; *Grissom v. Parish,* 62 N. C., 330; *Britton v. Miller,* 63 N. C., 270; *Wise v. Leonhardt,* 128 N. C., 289, 38 S. E., 892; *Cooley v. Lee,* 170 N. C., 18, 86 S. E., 720; *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482.

But this rule requires that the class of persons, alone to take, be plainly designated and definitely described. *Demil v. Reid,* 71 Md., 187.

Here, the limitation is not so clear, nor the circumscription of the class so definite, as to exclude the legal representatives of deceased brothers and sisters, either of the testator or of his wife, from sharing in the estate, even though there may be living brothers and sisters of the testator and of his wife capable of taking in their own right at the termination of the particular estate. In this respect the decision in *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669, may be apocryphal or of doubtful authority, and to the extent that it does not accord with the decision in the instant case, it should be regarded as disapproved.

CORNELIA T. JESSUP AND JOSEPH T. NIXON v. THOMAS NIXON.

(Filed 12 September, 1928.)

Descent and Distribution—Rights and Liabilities of Heirs and Distributees—Debts of Intestate and Encumbrances on Property—Setting Aside Foreclosure for Irregularity—Executors and Administrators.

After the death of a deceased intestate mortgagor, his heirs at law take his lands only when there is a sufficiency of his estate to pay his debts, and where the mortgage has been foreclosed in accordance with the power of sale contained in the instrument and a deed made to the purchaser, the heirs at law, to be entitled to have the deed set aside for irregularity of sale, must show a sufficiency of assets to pay creditors in order for them to recover the land, and an issue aptly tendered to establish the necessary facts under the evidence, when refused by the court, entitles the grantee in the deed to a new trial.

STACY, C. J., dissents; CONNOR, J., not sitting.

APPEAL by defendant from *Clayton Moore, Special Judge,* at April Term, 1928, of PERQUIMANS. New trial.

Ehringhaus & Hall and McMullan & LeRoy for plaintiffs.

Thompson & Wilson, Whedbee & Whedbee, S. C. Bragaw and Ward & Grimes for defendant.

CLARKSON, J. This action has been twice before this Court—186 N. C., p. 100; 193 N. C., p. 830. On the second appeal it was said: "The defendant's exception to the refusal of the trial court to grant his motion for judgment as of nonsuit was duly presented on the original hearing, but was not sustained. Certain peremptory instructions were held to be erroneous. Hence, the necessary effect of the rulings was to remand the cause for a new trial, the appeal being from a judgment rendered on a verdict of the jury, and the demurrer to the evidence not being sustained."

The record discloses: That Francis Nixon, Jr., died on or about 30 March, 1896; that he left surviving him his widow, Susan Nixon, and the following children, to wit: Cornelia T. Nixon (now the plaintiff, Cornelia T. Jessup), six years of age, the plaintiff Joseph T. Nixon, four years of age, and Kate H. Nixon, three years of age; and that thereafter and within ten lunar months after the death of said Francis Nixon, Jr., there was born to the said Susan Nixon another child, named Francis Nixon; that this child Francis Nixon and Kate H. Nixon died, and that upon their death there descended to and vested in the plaintiffs as their sole heirs at law, all the rights, title and interest, legal and equitable, of the said Francis Nixon and the said Kate H. Nixon, in and to the lands of their father, comprising two tracts—one tract known as "The Gum Pond Land," containing 104 acres of land more or less, and the other tract containing 28½ acres more or less.

That shortly after the death of the said Francis Nixon, Jr., the defendant, Thomas Nixon, was duly appointed and qualified as administrator of his estate, and that subsequently thereto the said Thomas Nixon was further appointed and qualified as guardian of the plaintiffs, and of the said Kate H. Nixon (Francis Nixon, the posthumous child, having died), children of the said Francis Nixon, Jr., deceased; that some time prior to his death, to wit, on or about 23 September, 1889, the said Francis Nixon, Jr., together with his wife, Susan Nixon, in order to secure the payment of the sum of $350 executed to Dr. David Cox a mortgage upon his lands, the same as before mentioned, which is duly recorded in the registry of Perquimans County, and that shortly after the death of the said Francis Nixon, Jr., to wit, on 1 July, 1896, the said David Cox did, pursuant to a sale at the courthouse door in said Perquimans County, execute a deed for said lands to the defendant, Thomas Nixon, which said deed is duly recorded in the registry of Perquimans County in Book XX, p. 457. At the auction sale defendant, Thomas Nixon, purchased the land at $675, subject to the rights of dower of Susan Nixon and the homestead rights of the minor children of Francis Nixon, Jr. The plaintiffs contended that said deed executed as aforesaid by Dr. David Cox to the defendant was valid and effective to pass and transfer to the defendant all the legal estate in said land of the said Dr. David Cox as mortgagee, but that same was invalid and ineffective to pass to the said defendant the equitable estate of the plaintiffs and their deceased brother and sister, or any part thereof, for that (1) said sale pursuant to which said deed was executed was had and made without the notice of sale and advertisement required by the terms and provisions of the said mortgage, and (2) said land was sold at said auction sale subject to the dower right of said Susan Nixon, widow of Francis Nixon, Jr., deceased, and subject further to the homestead rights of the children of the said Francis Nixon, Jr.

This action was brought on 11 August, 1921, after a lapse of some twenty-five years, and after defendant had been in possession of the land in controversy since July 1, 1896, to set aside the deed "be adjudged and declared a nullity" from the mortgagee, Dr. David Cox, to the defendant, Thomas Nixon, Jr., for irregularity in the sale. In the action, as reported in 186 N. C., at p. 101: "the jury found as to the third issue that the fair market value of the land at the time of the sale was $1,250." This Court, at p. 103, said: "The estate of the mortgagor was settled and the report filed and recorded 30 July, 1897, which showed that after payment of the mortgage debt the assets were $611.49, and the indebtedness was $1,156.78, the creditors receiving a dividend of 53 per cent. The plaintiffs must show that the assets of the estate were sufficient to pay his debts before they could ask the court to decree that they recover this land and its rents when the creditors had not been paid in full. The reservation of the homestead was to the detriment solely of the creditors and not of the heirs at law. In *Highsmith v. Whitehurst,* 120 N. C., 123, where the land was purchased by the administrator, the Court held that as the land brought full value and the price paid, which the creditors (as in this case) had ratified by accepting the proceeds which, together with the other assets, were not sufficient to pay the debts of the estate in full, the heirs never had any legal right to the land nor any equitable ground upon which to have the sale set aside or to have the purchaser declared a trustee for them. This has been followed in *Russell v. Roberts,* 121 N. C., 322; *Winchester v. Winchester,* 178 N. C., 483. The dower of the widow is not involved as she is not a party to this action."

This is "the law of the case." *Mfg. Co. v. Hodgins,* 192 N. C., p. 577; *Newbern v. Telegraph Co., ante,* 14. The defendant tendered in the court below the following issue: "What was the fair market value of the said land, subject to the dower right of the widow of Francis Nixon, deceased, subject further to the homestead rights of his children, on 1 July, 1896, the day of its sale under the said mortgage to David Cox?" This issue the court below declined. Defendant duly excepted and assigned error. We think the court below should have submitted the issue and the evidence bearing on the issue.

For the reason given, there must be a

New trial.

STACY, C. J., dissents.

CONNOR, J., not sitting.

WILSON W. RICKS v. THE ROCKY MOUNT SAVINGS AND TRUST COMPANY, THOS. H. BATTLE, H. E. BREWER, A. P. THORP AND T. E. RICKS, AS TRUSTEES OF THE ESTATE OF R. H. RICKS, DECEASED.

(Filed 12 September, 1928.)

Wills—Rights and Liabilities of Devisees and Legatees—General Devises and Bequests.

A legatee, ordinarily, is not entitled to compensation for loss he may have sustained by reason of the diminution of the value of his legacy or for his failure or inability to collect the purchase price thereof.

APPEAL by plaintiff from *Barnhill, J.*, at Chambers, 16 June, 1928. From NASH. Affirmed.

T. T. Thorne and G. M. Fountain for plaintiff.
Battle & Winslow for defendant.

PER CURIAM. The court below rendered the following judgment: "The court having heard argument and fully considered same, is of the opinion that the defendant trustees have no power under the provisions of the will referred to upon the facts alleged in the complaint and admitted in the answer to make compensation to the plaintiff for any loss he may have sustained by reason of diminution of the value of his legacy, or his failure or inability to collect the purchase price thereof. Wherefore, the plaintiff's action is dismissed, the court in its discretion directing that the defendants, out of the trust estate, pay the cost thereof."

From a careful reading of the record, the will of R. H. Ricks and codicils, and briefs of the parties, we think the judgment of the court below correct. The judgment is

Affirmed.

MRS. LILLIE B. PARKS, ADMINISTRATRIX OF L. C. PARKS, v. SANFORD & BROOKS, INC., ET AL.

(Filed 12 September, 1928.)

1. Master and Servant—Master's Liability for Injuries to Servant—Safe Place to Work.

Evidence that the plaintiff's intestate, while working on a platform 26 inches wide, fell into a river and was drowned, by reason of his saw "pinching," and throwing him off his balance, is not sufficient to establish negligence on the part of the master in not furnishing him a safe place to work, and defendant's motion for judgment as of nonsuit was properly allowed.

2. Same—Evidence of Safe Place to Work.

Whether or not the place at which plaintiff's intestate was at work was unsafe is a question for the jury, and the opinion of witnesses on this question is properly excluded.

APPEAL by plaintiff from *Barnhill, J.*, at May (Special) Term, 1928, of CHOWAN. Affirmed.

Civil action to recover damages for wrongful death of plaintiff's intestate.

From judgment dismissing the action as of nonsuit, at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court.

H. R. Leary and McMullan & LeRoy for plaintiff.
Ehringhaus & Hall for defendants.

PER CURIAM. In her complaint plaintiff alleges that the death of her intestate was caused by the negligence of defendants, in that they failed to exercise due care to furnish her intestate a reasonably safe place in which to work as an employee of defendant, Sanford & Brooks, Inc., under the supervision of the other defendants, the general manager and foreman of their said codefendant.

The evidence offered by plaintiff fails to sustain this allegation. It appears from said evidence that plaintiff's intestate, while at work on a bridge over the Chowan River, fell from said bridge into the river and was drowned. Deceased was standing on a platform, 26 inches wide, sawing a plank in order to fit it around a pile. His saw "pinched," causing deceased to lose his balance and to fall off the platform into the river. The evidence tends to show that the fall was due to an accident, and not to any negligence on the part of defendants, or either of them. There was no error in allowing defendants' motion for judgment as of nonsuit upon the evidence offered by plaintiff.

Nor was there error in the ruling of the court sustaining objections by defendants to testimony offered by plaintiff as evidence of defendants' negligence. Whether or not the place at which plaintiff's intestate was at work, when he fell into the river, was unsafe, because of the negligence of defendants, was the question to be passed upon by the jury; the opinion of the witnesses with respect to this matter was not competent as evidence upon the issue, and was properly excluded as evidence. *Wilson v. Suncrest Lumber Co.*, 186 N. C., 56, 118 S. E., 797.

The judgment dismissing the action as upon nonsuit is

Affirmed.

NORTH CAROLINA CORPORATION COMMISSION v. BANK OF HYDE, BRANCH BANK AND TRUST COMPANY, RECEIVER.

(Filed 12 September, 1928.)

Appeal and Error—Review—Burden of Showing Error.

The burden of showing error on appeal to the Supreme Court is on the appellant.

APPEAL from *Barnhill, J.*, at May Term, 1928, of HYDE. Affirmed.

Ehringhaus & Hall and C. B. Spencer for appellant.
Miley C. Glover and Finch & Rand for appellee.

PER CURIAM. C. L. Bell, clerk of the Superior Court of Hyde County made a motion in the above-entitled cause "to have a certain sum of money, to wit, $2,172.78, on deposit in the defunct Bank of Hyde declared a trust fund and a preferred lien against the assets of the Bank of Hyde and an order directing that same be paid as a preferred claim."

In the findings of fact by the court below it appears that "Trial by jury was expressly waived and the parties agreed that the court should hear and determine the facts as well as the law and enter such judgment as to him should appear proper. After hearing the evidence offered by the petitioner, the court found as a fact that the deposit made by the petitioner was not such a special deposit as entitled the petitioner to priority in payment out of the assets of the defunct bank, and entered judgment accordingly."

The court below found the facts upon which it based its judgment. The burden is on appellant to show error.

From a careful reading of the record and the authorities cited in the briefs, we are of the opinion that the judgment below must be

Affirmed.

FOREMAN-BLADES LUMBER COMPANY v. TUNIS HEADING AND STAVE COMPANY.

(Filed 12 September, 1928.)

Venue—Nature or Subject of Action.

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated.

APPEAL by defendant from *Barnhill, J.*, at March Term, 1928, of PASQUOTANK.

W. D. Boone for appellant.
McMullan & LeRoy for appellee.

PER CURIAM. As we interpret the amended complaint the alleged cause of action is the wrongful conversion of timber, situated on land in Gates County, after the trees had been cut and sawed into lumber. In apt time the defendant made a motion to change the place of trial from Pasquotank to Gates. C. S., 470; *Dixon v. Haar,* 158 N. C., 341. The motion was denied, and the defendant excepted and appealed. The judgment denying the motion is free from error. *Cedar Works v. Lumber Co.,* 161 N. C., 604. Judgment

Affirmed.

NETA EDWARDS v. JOEL T. MATTHEWS, EXECUTOR OF E. D. BASS, DECEASED.

(Filed 12 September, 1928.)

Executors and Administrators—Allowance and Payment of Claims—Claims Against Decedent for Services Rendered—Quasi-Contracts—Quantum Meruit.

Where the plaintiff declares upon an express contract with defendant's intestate she is not precluded from recovery upon *quantum meruit* for services rendered three years before intestate's death when the evidence supports the claim and there is no relationship between the decedent and the plaintiff to raise the presumption that the services were gratuitously rendered.

APPEAL by defendant from *Daniels, J.*, at January Term, 1928, of NASH. No error.

Civil action to recover for services rendered by plaintiff to defendant's testator.

By its answer to the first issue the jury found that defendant's testator did not enter into the express contract with plaintiff, as alleged in her complaint.

From judgment on the verdict that defendant is indebted to plaintiff upon a *quantum meruit* for such services, in the sum of $2,100, defendant appealed to the Supreme Court.

Austin & Davenport for plaintiff.
L. T. Vaughn, W. M. Person and I. T. Valentine for defendant.

PER CURIAM. Defendant's exception to the submission of the fourth issue, to wit: "Is the defendant indebted to the plaintiff upon the *quantum meruit* for services rendered?" cannot be sustained.

In her complaint plaintiff alleged an express contract by which defendant's testator promised and agreed to compensate her liberally for the services rendered by her. She relied upon this contract as the foundation of her cause of action. However, her failure to prove the express contract did not preclude her recovery for the services which the evidence shows that she rendered to defendant's testator upon a *quantum meruit.* There was no relationship between plaintiff and defendant's testator from which a presumption arises that the services were gratuitous. *Lowrie v. Oxendine,* 153 N. C., 268, 69 S. E., 131. There was no error in the submission of the fourth issue. *Stokes v. Taylor,* 104 N. C., 394, 10 S. E., 566, 13 C. J., 750, sec. 910.

Recovery was limited, under instructions of the court, to services rendered during three years immediately preceding the death of defendant's testator. Assignments of error based upon exceptions to the admission of evidence cannot be sustained. The evidence was properly submitted to the jury and is sufficient to sustain the verdict. There are no assignments of error based upon exceptions to the charge. The judgment is affirmed. There is

No error.

BRANCH BANKING AND TRUST COMPANY, GUARDIAN OF ETHEL LEE PETWAY, v. R. L. BRINKLEY, ADMINISTRATOR OF THE ESTATE OF JACK W. MONTAGUE.

(Filed 19 September, 1928.)

Insurance—Right to Proceeds upon Death of Beneficiary—Descent and Distribution.

Where a soldier insured under the provisions of the War Insurance Act names his brother and sister as beneficiaries in the policy, and is killed in action, leaving him surviving the brother and sister, and aunts and uncles, and shortly after the insured's death his brother is killed, leaving the sister his next of kin, and certain payments are made to the sister under the terms of the policy, and she dies, leaving her surviving a daughter: *Held,* upon the death of the insured his personal property descends immediately to the brother and sister as his next of kin, and, upon the death of the brother, the sister takes the whole interest as distributee and not as beneficiary, and upon her death the interest descends to her daughter as heir at law, to the exclusion of the aunts and uncles.

CIVIL ACTION, before *Midyette, J.,* at May Term, 1928, of WILSON.

The judgment contains all the essential facts and was as follows: "This cause is heard at the May Term, 1928, of the Superior Court of

Wilson County, before his Honor, G. E. Midyette, Judge, holding the courts of the Second Judicial District, and is heard on the motion of the plaintiff for judgment on the pleadings.

From the complaint and the answer the following facts are admitted, and all other facts of the complaint are admitted:

1. That the plaintiff herein is the duly appointed guardian of Ethel Lee Petway, a minor, residing in Wilson County.

2. R. L. Brinkley is the duly appointed and qualified administrator of the estate of Jack W. Montague, who was killed in action on September 26, 1918, while serving as a soldier with the American Army in France.

3. That prior to the death of Jack W. Montague, he applied for and there was issued to him by the Bureau of War Risk Insurance of the Treasury Department of the United States of America, War Risk Insurance in the amount of $10,000, payable to his brother John M. Montague and his sister, Walina Petway, in an equal amount, in monthly installments as provided by the Acts of Congress relating to War Risk Insurance.

4. John M. Montague, one of the beneficiaries under said certificate of insurance, who was also a soldier with the American Army in France, died of wounds received in action on 6 October, 1918, and by reason of his death Walina Petway, under and subject to the provisions of the Acts of Congress, became solely entitled to all of the benefits of said certificate of insurance on the life of Jack W. Montague.

5. Jack W. Montague was survived by his brother, John M. Montague, who died on 6 October, 1918, leaving as his next of kin Walina Petway, and by Walina Petway, who was after the death of John M. Montague sole next of kin to Jack W. Montague.

6. He was survived by certain uncles and aunts.

7. Walina Petway died intestate in Wilson County, in 1924, survived by her daughter and sole next of kin, Ethel Lee Petway, who was born after the death of Jack W. Montague and John M. Montague.

8. That the Bureau of War Risk Insurance has paid to R. L. Brinkley, as administrator of the estate of Jack W. Montague, to be administered according to the laws of intestacy of North Carolina, the commuted value of the certificate of insurance on the life of Jack W. Montague, and the administrator has in hand at this time, belonging to the said estate, a sum of money of approximately $7,434.19.

9. There are no unpaid debts of the estate of Jack W. Montague, and the amount now on hand with the administrator belongs to the proper distributees of the said Jack W. Montague.

The court is of the opinion that the estate in the hands of the administrator should properly be distributed to Branch Banking and

Trust Company, guardian of Ethel Lee Petway, daughter of Walina Petway, to the exclusion of the uncles and aunts of Jack W. Montague.

Thereupon, by the court, it is ordered, considered, adjudged and decreed that R. L. Brinkley, administrator of the estate of Jack W. Montague, do pay unto Branch Banking and Trust Company, guardian of Ethel Lee Petway, the net amount remaining in his hands, belonging to the estate of Jack W. Montague, after the payment of the cost of this action, including an allowance to be hereafter made for the use of his attorney in defending this action, and for doing such other acts and things as may be necessary and proper for said attorney to do to properly safeguard the interest of all parties hereto.

For the protection of the administrator and his surety, the court, of its own motion, suggests that the administrator note his exception to this order and perfect an appeal to the Supreme Court of North Carolina, being moved to do so by reason of the fact that the question of law presented in this cause has not heretofore been determined by the courts of this State in so far as the same has come to the attention of this court."

W. A. Lucas and Manning & Manning for plaintiff.
Connor & Hill for defendant.

BROGDEN, J. The question is this: Under the War Insurance Act, Title 38, chapter 10, section 514, U. S. Code Annotated, are the distributees of a deceased soldier to be ascertained at the time of his death or at the time of the death of the beneficiary named in the certificate of insurance?

The act referred to provides in section 514 thereof, among other provisions, as follows: "If the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award."

The statute mentioned has been amended from time to time, but these amendments are not pertinent to this appeal.

Jack W. Montague received war risk insurance in the sum of $10,000, payable to his brother, John M. Montague, and his sister, Walina Petway. The insured was killed in action on 26 September, 1918, while serving as a soldier with the American Army in France. His brother, John M. Montague, one of the beneficiaries named in said certificate of insurance, died of wounds received in action on 6 October, 1918. Therefore the insured, Jack W. Montague, was survived by his brother, John M. Montague, and his sister, Walina Petway. It does not appear that either the mother or father of the insured was alive at the time of the death of the insured. John M. Montague, who died of wounds on 6 October, 1918, left no children, or widow, or father, or mother, and his next of kin was his sister, Walina Petway. After the death of Jack W. Montague the Bureau of War Risk Insurance paid to Walina Petway the monthly installments according to said certificate of insurance until the death of said Walina Petway in 1924. Walina Petway left her surviving as her sole next of kin a daughter, Ethel Lee Petway, who was born after the death of the insured. After the death of Walina Petway, to wit, on 4 September, 1925, the defendant, R. L. Brinkley, was duly appointed and qualified as administrator of Jack W. Montague, the insured. The Bureau of War Risk Insurance has paid to said administrator the balance due under said certificate of insurance, amounting to $7,889.00. The uncles and aunts of said insured claim the fund, and the plaintiff, the guardian of Ethel Lee Petway, claims the fund. The uncles and aunts of the insured assert that, upon the death of the beneficiary, Walina Petway, the fund became payable to the "estate of the insured." The guardian of Ethel Lee Petway asserts that the "estate of the insured," with reference to those entitled as distributees thereof, should be ascertained as of the death of the insured and not as of the death of the beneficiary.

The identical question presented has been decided by the courts of last resort in Iowa, Maryland, Texas, and Wisconsin, and also by the Supreme Court of the United States. *In re Pivonka's Estate,* 211 N. W., 246; *In re Jacobs' Estate,* 136 Atlantic, 536; *Battaglia v. Battaglia,* 290 S. W., 296; *In re Singer's Estate,* 213 N. W., 479; *White v. U. S.,* 70 L. Ed., 530.

The principle of law governing the question is thus stated *In re Jacobs' Estate, supra.* "The distributee of the estate of George Mitchell Jacobs, under our statutes, was his mother, as he was not survived by his father, and had no descendants. The vested right of the mother to the estate of her intestate son was not affected by the fact that she died before the estate was administered, or that she was the recipient, during her life, of payments under the contract of insurance from which the only asset of the estate was derived. If she had not been named as beneficiary to that extent in the policy, it would hardly be contended that her death, subsequent to that of her son, extinguished the interest which she had acquired in his estate as sole distributee under our statute. . . . In our opinion, the fund for distribution must follow the course which the statute defines, and be paid to the personal representative of the decedent's mother, who became entitled to his estate under the explicit provisions of the law."

Again, in the *Battaglia case, supra,* the Court said: "Upon the death of Chas. W. Battaglia, his father, under the retroactive feature of the law of 4 March, 1925, thus occupied as to the insurance the dual capacity of beneficiary and sole heir at law of the insured. His right as beneficiary did not destroy or in any wise impair any right which he had as heir at law. Whatever right he had as an heir passed upon his death to his sole heir, the appellant herein."

The *Singer case, supra,* holds: "The whole amount of the policy not having been paid to the beneficiary, the estate of the deceased was augmented by the present worth of future payments. When this sum was paid to the administrator under the law, it must be distributed to his heirs as of the date of his death."

Also in *Pivonka's Estate, supra,* the Court said: "The estate of the insured came into being as the estate of a deceased person instantly upon the death of such deceased person. The heirs of a decedent are, under the laws of this State, to be determined by ascertaining upon whom the law casts the estate immediately upon the death of an ancestor. Whether or not the estate of the soldier was in process of administration prior to the death of the beneficiary is quite immaterial."

Applying these principles of law to the facts disclosed by the record, it is clear that, under our statute of distribution, the next of kin of the insured at the time of his death in 1918, were his brother John and his sister Walina, and that the personal property of said decedent vested in said next of kin immediately upon his death. John died of wounds a few days after his brother Jack, leaving as his sole next of kin his sister, Walina Petway. Walina Petway therefore took the estate not as beneficiary, but as distributee under the laws of North Carolina then in force. It necessarily follows that the child of Walina Petway, the plaintiff in this action, is entitled to the whole fund to the exclusion of uncles and aunts.

Affirmed.

W. T. HINNANT v. S. A. BOYETTE.

(Filed 19 September, 1928.)

1. Judgment—Conclusiveness of Adjudication—Interlocutory Judgments —Issues.

When, in an action to recover the purchase price of goods sold and delivered, the plaintiff alleges the purchase of an inventory of articles, giving a list of them, which the defendant denies, but alleges that only a part of the articles were purchased, not by him but by his son who had fully paid for them and, under order of court, a receiver was appointed to take possession of the goods, and the defendant retained possession under the further terms of the order, by filing a bond securing the payment of any judgment the plaintiff might recover in the action, whether the jury found the sale to have been made to the defendant or to his son, and the order provides that the son might be made a party: *Held*, the terms of the order, unexcepted to by defendant and under which he has proceeded, are binding upon him, and, in the action, issues as to purchase either by the defendant or his son should be submitted to the jury, and the court's refusal to submit such issues upon the application of the plaintiff entitles him to a new trial.

2. **Parties—Defendants—Joinder.**

When the issues in controversy raise the question as to whether the plaintiff sold certain goods to the defendant or to his son, the son is at least a proper party to the action, and should be made a party defendant before the trial of the action.

APPEAL by plaintiff from *Nunn, J.*, at February Term, 1928, of JOHNSTON. New trial.

Action to recover for goods sold and delivered under contract between plaintiff and defendant.

In his complaint plaintiff alleged that pursuant to a contract entered into by and between plaintiff and defendant, on or about 7 December, 1925, he sold and delivered to defendant certain articles of personal property, described in an inventory thereof, attached to and made a part of the complaint; that defendant agreed to pay to plaintiff, in cash, upon the completion of said inventory, as the purchase price of said articles, the amount shown thereby as the value of said articles, plus 7½ per cent; that before the completion of said inventory, and while same was being taken, defendant paid to plaintiff the sum of $1,500.00, on account of said purchase price; that upon the completion of said inventory, the articles shown therein were delivered to defendant, and that thereafter defendant, although retaining possession of said property, declined and refused to pay to plaintiff the balance due on said purchase price, to wit, the sum of $2,960.81.

Plaintiff demands judgment that he recover of defendant the sum of $2,960.81, with interest and costs, and prays that a receiver be appointed by the court to take possession of the articles of personal property, included in said inventory, and now in possession of defendant, and that said receiver be directed to sell the same under orders of the court, and apply the proceeds of said sale as payments on said judgment.

Defendant, in his answer, denied that he had purchased from plaintiff the articles of personal property as alleged in the complaint, and also denied that he had paid any sum to plaintiff on account of the purchase price for same. He denied that said articles of personal property were delivered to him by plaintiff, or that same were in his possession. Defendant alleged that his son, Willie Boyette, entered into a contract with plaintiff by which he purchased a portion of said articles of personal property included in the inventory, and that his said son had paid to plaintiff the full amount of the purchase price for the articles of personal property sold and delivered by plaintiff to his said son.

After the filing of the complaint and answer, the cause came on for hearing before Sinclair, J., upon plaintiff's motion for the appointment of a receiver, in accordance with the prayer in the complaint. Upon facts found at said hearing, an order was made appointing a receiver, and authorizing said receiver, upon the execution of a bond in the sum of $4,000.00, to take possession of "the property described in the inventory attached to the complaint, and now in the possession of S. A. Boyette and Willie Boyette, and situate and being in the filling station and garage formerly owned by plaintiff in the town of Micro." The said order contains the following claim:

"It is further ordered, considered and adjudged that upon the execution of bond by defendant, S. A. Boyette, in the sum of $4,000.00, conditioned upon the payment of such judgment as plaintiff may recover for said goods as shown by said inventory attached to the complaint, upon the final adjudication of said cause, whether the jury should find that said sale was made to the defendant, S. A. Boyette, as alleged in the complaint, or to the said Willie Boyette, as alleged in said defendant's answer, then and in that event the receiver herein appointed is directed to deliver to the defendant the property described in said inventory attached to and made a part of the complaint in this cause, and thereupon, it is ordered that the receiver and his bondsman be discharged from all liability on said receiver's bond.

"This cause is continued for further hearing and orders.

"Plaintiff has leave to make Willie Boyette party defendant."

Thereafter, a bond executed by defendant, S. A. Boyette, with P. A. Boyette as his surety, in the sum of $4,000.00, and conditioned as required by said order, was filed in this cause. Said bond has been lost from the papers in this cause, but it was agreed on the argument in this court that the bond as appears in the record is substantially a copy of the bond filed by the defendant. Upon the execution of said bond, and pursuant to the terms of the order made by Sinclair, J., the articles of personal property included in the inventory attached to and made a part of the complaint, were not taken into possession by the receiver.

Willie Boyette, son of defendant, has not been made a party defendant.

At the trial the following issues were submitted to the jury:

"1. Did the defendant, S. A. Boyette, contract to buy from plaintiff the property described in the complaint, at the price and upon the terms alleged in the complaint? Answer: ....

"2. If so, what amount is plaintiff entitled to recover of the defendant, S. A. Boyette? Answer: ...."

The jury, having answered the first issue "No," under instructions of the court, did not answer the second issue.

From judgment upon the verdict, plaintiff appealed to the Supreme Court.

Albert M. Noble and Battle & Winslow for plaintiff.
Paul D. Grady and J. Ira Lee for defendant.

CONNOR, J. The issues submitted to the jury at the trial of this action arise upon the pleadings; answers to these issues would be determinative of plaintiff's right to recover upon the cause of action alleged in the complaint. However, the controversy between the parties has been limited by the order of Sinclair, J., to which defendant did not except. Having failed to except to this order, defendant is deemed to have consented thereto; he is bound by its terms. *Bryson v. R. R.,* 141 N. C., 594, 54 S. E., 434. Defendant, by the execution of the bond, availed himself of the provisions of the order, and thereby precluded the receiver, appointed by the court, upon plaintiff's motion, from taking possession of the property. The property, by virtue of the order and the bond, remained in the possession of defendant and his son, Willie Boyette. Defendant agreed to pay such judgment as plaintiff might recover upon the trial, whether the jury should find that he was the purchaser, or whether the jury should find that his son was the purchaser. Defendant thus, in effect, stipulated that the issues to be submitted to and passed upon by the jury should involve only the amount which plaintiff was entitled to recover by judgment against either the defendant or his son. At the trial, by virtue of the order of Sinclair, J., the matter in controversy between the parties was the subject-matter of the contract, and not the parties thereto.

Plaintiff contends that he sold and delivered all the articles included in the inventory attached to the complaint; defendant contends that plaintiff sold only such portion of the said articles as plaintiff has been paid for. Issues involving these contentions are the proper issues, under stipulation of the parties. Issues, substantially similar to the issues tendered by plaintiff, and refused upon objection of defendant, should be submitted to the jury.

Leave was given plaintiff in the order of Sinclair, J., to make Willie Boyette a party defendant. He is at least a proper party, and should be made a defendant, prior to the trial of the action.

For errors with respect to the issues, there must be a

New trial.

THE FARMERS BANKING AND TRUST COMPANY, OF TARBORO, N. C., FINANCIAL AGENT OF EDGECOMBE COUNTY, NORTH CAROLINA, v. THE COUNTY OF EDGECOMBE, NORTH CAROLINA.

(Filed 19 September, 1928.)

Municipal Corporations—Officers, Agents and Employees—Banks Acting as County Treasurers—Contracts—Constitutional Law.

Where the office of county treasurer has been abolished and a bank or trust company has been appointed under the provisions of C. S., 1389, to perform the duties of treasurer, and receive as compensation the profits of the moneys deposited by the county arising in the course of the bank's business as such, the arrangement so made is not a contract between the county authorities and the bank contemplated by the provision of the Constitution prohibiting the impairment of the obligations of a contract, but the obligations arise by statutory provisions relating to public matters within legislative control, and the contention of the bank is untenable that the county may not at a later date, under authority of statute, require it to give bonds for the protection of the public funds, or to pay interest on the daily average balance. Public Laws 1927, ch. 146, sec. 19.

APPEAL by plaintiff from *Midyette, J.*, at Chambers in Nashville, 3 May, 1928. From EDGECOMBE.

Controversy without action, submitted on an agreed statement of facts, to determine the right and duty of the board of commissioners of Edgecombe County, under section 19, chapter 146, Public Laws 1927, to require the plaintiff to furnish surety bonds and pay 2% interest on the average daily balance during each calendar month of all moneys or deposits held by it as financial agent of the county.

The facts, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. Pursuant to the provisions of chapter 142, Public Laws 1913, and chapter 458, Public Laws 1915, now C. S., 1389, the board of commissioners of Edgecombe County duly abolished the office of treasurer of said county, and on the first Monday in December, 1916, and biennially thereafter, appointed a solvent bank or trust company as financial agent of the county to perform the duties theretofore devolving upon the treasurer.

2. The Farmers Banking and Trust Company, of Tarboro, N. C., was duly appointed financial agent of Edgecombe County on the first Monday in December, 1926, for the ensuing term of two years, which said term will not expire until December, 1928. This appointment was accepted, personal bonds were executed, and the plaintiff duly entered upon the discharge of its duties as such financial agent.

3. Agreeably to the provisions of section 19, chapter 146, Public Laws 1927, the board of commissioners of Edgecombe County, by resolution

duly adopted, 3 October, 1927, designated the Farmers Banking and Trust Company, of Tarboro, N. C., as the official depository of the funds of the county and called upon said depository to furnish a surety bond, as required by said section, and also a surety bond to cover the county school funds as provided by 3 C. S., 5619, and specified that said depository should pay interest on county deposits at the rate of 2% per annum computed on the average daily balance during each calendar month.

Compliance with this resolution has been refused by the plaintiff.

The court being of opinion that the board of commissioners was within its rights in adopting said resolution, entered judgment, in accordance with the agreement of the parties, that the plaintiff should abide by the terms thereof and comply therewith.

Plaintiff appeals, assigning error.

George M. Fountain for plaintiff.
Henry C. Bourne and Battle & Winslow for defendant.

STACY, C. J. It is provided by C. S., 1389, that when the office of county treasurer is abolished, by the commissioners of any of the counties designated therein, and in lieu thereof one or more solvent banks or trust companies located in the county is appointed as financial agent of the county, "such bank or trust company shall not charge nor receive any compensation for its services, other than such advantages and benefit as may accrue from the deposit of the county funds in the regular course of banking." Having been appointed financial agent of Edgecombe County for a term of two years under the provisions of this statute, it is the position of the plaintiff that the commissioners may not thereafter and during said term, under sanction of legislative authority, change the terms of its appointment by demanding the execution of surety bonds and exacting the payment of 2% interest on public deposits, without "impairing the obligations of the contract" within the meaning of the constitutional provision on the subject. The position is untenable. The terms of plaintiff's appointment are not fixed by contract with the commissioners of the county, but by the statute under which the appointment was made. *Comrs. v. Steadman,* 141 N. C., 448, 54 S. E., 269; *Mial v. Ellington,* 134 N. C., 131, 46 S. E., 961; *S. v. Bank,* 194 N. C., 436, 140 S. E., 38.

The contract clause of the Constitution of the United States, Art. I, sec. 10, as interpreted in a number of decisions, is restricted to engagements, or contracts, "which respect property, or some object of value, and confer rights which may be asserted in a court of justice." *Dartmouth College case,* 4 Wheat., 518. It has no application to statutes relating to public subjects within the domain of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it. *Newton v. Comrs.,* 100 U. S., 548, 25 L. Ed., 710.

In the instant case the action of the board of commissioners, which plaintiff questions, is fully authorized by section 19, chapter 146, Public Laws 1927, wherein it is provided that the county commissioners shall require of official depositories of county funds "a bond in some surety company authorized to do business in North Carolina in an amount sufficient to protect such deposits," and further: "It shall be the duty of the board of commissioners to provide by recorded resolution for interest to be paid on public deposits at a rate to be determined by the board of commissioners."

The judgment is correct and will be upheld.

Affirmed.

STATE v. INA KING.

(Filed 19 September, 1928.)

Homicide—Manslaughter—Evidence Sufficient to Take Case to Jury.

Evidence tending to show that the defendant knocked the deceased down, jumped on her with both knees in her stomach, and choked her, resulting in peritonitis which caused death, *is held* sufficient, in an action of homicide, to deny defendant's motion as of nonsuit, and to sustain the jury's verdict of manslaughter. *S. v. Everett,* 194 N. C., 442, cited and distinguished.

APPEAL by defendant from *Daniels, J.,* at April Term, 1928, of HERTFORD.

Criminal prosecution tried upon an indictment charging the defendant with the murder of Mary Flossie Williams.

There is evidence on the record tending to show that on 8 March, 1928, Mary Flossie Williams, a negro girl about 9 or 10 years old, who lived with her grandfather in Hertford County, where the defendant, her aunt in law, also lived, was writing or drawing figures on a piece of paper, when she dropped the same upon the floor, and the defendant's small boy picked it up, and, in obedience to his mother's command, gave it to the defendant; whereupon Mary Flossie Williams, according to some of the witnesses, struck the defendant (presumably with her hand), while others say she struck the boy, and the defendant in turn hit the deceased, knocked her down, jumped on her with both knees in her stomach, and choked her. Peritonitis set in from the injury caused to the little girl's stomach, and, as a result thereof, she died on 5 April following.

Upon this evidence the case was submitted to the jury, and from an adverse verdict of manslaughter, and judgment pronounced thereon, the defendant appeals, relying chiefly upon the court's refusal to dismiss the action as in case of nonsuit.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Bridger & Eley for defendant.

STACY, C. J., after stating the case: Considering the evidence in its most favorable light for the State, the accepted position on a demurrer or motion to nonsuit, we think the trial court properly submitted the case to the jury. *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; *S. v. Oakley,* 176 N. C., 755, 97 S. E., 616. The function of the court when considering a motion of this kind is, not to pass upon the weight of the evidence, but to determine its sufficiency to support a verdict. *S. v. Utley,* 126 N. C., 997, 35 S. E., 428; *S. v. Hart,* 116 N. C., 976, 20 S. E., 1014.

The jury was fully warranted in finding that Mary Flossie Williams came to her death as a direct result of the injury inflicted by the defendant. The case is not like *S. v. Everett,* 194 N. C., 442, 140 S. E., 22, strongly relied upon by defendant, for in the *Everett case* there was no sufficient evidence of the *corpus delicti* or to show that a crime had been committed.

A careful perusal of the record leaves us with the impression that no error was committed on the trial. The verdict and judgment will be upheld.

No error.

L. A. RANDOLPH COMPANY v. LOSSIE R. LEWIS.

(Filed 26 September, 1928.)

1. Trial—Instructions—Objections and Exceptions.

Where the judge, in his charge to the jury, misstates the admissions of a party, the mistake should be called to his attention at some appropriate time before the issues are finally given to the jury, or in time for him to correct the error, if any made by him.

2. Sales—Requisites and Validity—Consideration.

Where the husband and wife give their note in payment for an automobile used as a family car, the consideration therefor is sufficient to support an action against her.

3. Bills and Notes—Requisites and Validity—Execution and Delivery—Duress.

Where a note is given by a husband and wife, and the husband procures her execution by duress, the note is voidable only, and is good in the hands of a holder in due course for value, and without notice of the duress. The distinction between duress in the procurement of the execution and duress in the execution pointed out by ADAMS, J.

APPEAL by defendant from *Grady, J.*, at March Term, 1928, of PITT. No error.

The plaintiff brought suit to recover an amount alleged to be due on four notes signed by W. E. Lewis and his wife, Lossie R. Lewis. W. E. Lewis is dead and his surviving wife is the only defendant. All the notes were dated 16 April, 1925. The face of three of them was $139.68 each, and of the fourth, $97.03, representing a total alleged indebtedness of $516.07. There was evidence tending to show that the notes were given for the purchase of an automobile. The defendant denied that she was indebted to the plaintiff and alleged that her signature to the notes was procured by her husband by intimidation and coercion and that the notes were without consideration.

The issues were answered as follows:

1. Did the defendant, Lossie R. Lewis, execute the notes sued on? Answer: Yes, by consent.

2. If so, were said notes without consideration, as alleged by the defendant? Answer: No.

3. Was the execution of said notes on the part of the defendant procured by duress or through fear of her husband as alleged by defendant? Answer: Yes.

4. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $516.06, with interest from 16 April, 1925.

Judgment for plaintiff and appeal by defendant on errors assigned.

F. M. Wooten for plaintiff.
Julius Brown for defendant.

ADAMS, J. The first issue was answered by consent; but in reference to the second the defendant excepted to his Honor's instruction that she had admitted that the notes represent the purchase price of an automobile sold by the plaintiff to her and her husband. There are at least two reasons why these exceptions (first and second) cannot be sustained.

(1) Certain expressions in her testimony are susceptible of the interpretation given them in the charge, and if she wished to contest the question whether she and her husband had bought the car she should have called the matter to the attention of the court before the issues were finally submitted to the jury. *S. v. Johnson,* 193 N. C., 701. In *Hardy v. Mitchell,* 161 N. C., 351, it was said: "It is true we find no such admission in the record, but it may have been made orally during the trial and not appear of record, but the instruction was a statement of a fact made to the jury by the court. It was not a conclusion of law. If it was an inadvertence upon the part of the judge, it was the duty of counsel for defendant at the conclusion of the charge, or at some appropriate moment before the case was finally given to the jury, to call the judge's attention to it, so that the misunderstanding could be cleared up and the error corrected at the time. Counsel will not be permitted to sit still and acquiesce in a statement by the court that a fact is admitted when it is not. Counsel should give the court opportunity to correct the error, if in fact one was made." (2) The notes were not "without consideration," if it be granted that the car was sold to the husband of the defendant and, as she testified, "was used by Mr. Lewis and his family."

The next exception involves the legal effect of the jury's answer to the third issue, *i. e.,* that the defendant's signature to the notes was procured by duress—by the compulsion or constraint of her husband. In reference to this matter the defendant testified: "His (her husband's) treatment of me prior to my signing the notes was very cruel. He hit and beat me a time or two over these notes. I refused to sign them, and they stayed at my house about three weeks before I would sign them, and finally through fear and under a pistol I signed them." The theory of the defendant is that the notes are absolutely void.

As a general rule a contract made under duress is not void but voidable—a rule which unquestionably applies to executory contracts under seal; for the defense of *non est factum* is entirely distinct from a defense which admits the execution of the instrument and sets up matter in avoidance of the contract. *Worcester v. Eaton,* 7 A. D. (Mass.), 155. It is true that duress may affect the execution as well as the inducement to the execution of the contract; but in the execution it is rare. Page on Contracts, secs. 503, 504; Williston on Contracts, sec. 1623. In section 1622 Williston says: "Duress, like fraud and mistake, may completely prevent the mutual assent necessary for the formation of a contract or sale, or it may be merely a ground for setting aside a bargain because the expression of mutual assent thereto was improperly obtained. If a man by force compels another to go through certain indications of assent, as by taking his hand and forcibly guiding it, there is no real expression of mutual assent for the act is not that of him whose hand was guided. He is a mere automaton. But in the ordinary case where duress is exercised, as generally when fraud is exercised, there is an actual expression of assent, though in view of the way in which the assent was obtained it is inequitable to permit the enforcement of the bargain." In the illustration given of forcibly guiding the hand the party is deprived of all volition. The same illustration of the principle appears in 9 R. C. L., 723, sec. 13.

Duress in the inducement exists where the party subjected to the duress intends to execute the contract and such intention is caused by duress. In this event the contract is voidable. "A contract made under duress is ordinarily voidable and not void, for the consent is present, although not such a free consent as the law requires." 13 C. J., 398, sec. 311.

It is well settled that as between the immediate parties—here the defendant and her husband—duress in obtaining her signature to the note would be a good defense; it would likewise be a good defense against a holder with notice. The appellant does not contend that the plaintiff, the payee in the notes, had any knowledge of the alleged duress. The notes represent the price of an automobile purchased from the plaintiff and used by the defendant and her family. The authorities uniformly support the position that where the grantee in a deed or the payee in a note has neither instigated the duress, nor connived at it, nor had knowledge of it, duress by others is not ground for avoiding the contract. *Wells Fargo Bank v. Barnett* (C. C. A.), 43 A. L. R., 916; *Meyer v. Guardian Trust Co.,* 35 A. L. R., 856; *White v. Graves,* 9 A. R. (Mass.), 38; *Green v. Scranage,* 87 A. D. (Ia.), 447. This principle is embodied in our statute law. If in a conveyance of land by a husband and his wife the private examination or acknowledgment of the wife is procured by fraud or duress exercised by the husband, the conveyance is not thereby invalidated unless it is shown that the grantee participated in the fraud or duress. C. S., 1001. In the following cases the party who had instigated the duress sought to take advantage of his own wrong: *Heath v. Cobb,* 17 N. C., 187; *Meadows v. Smith,* 42 N. C., 7; *Edwards v. Bowden,* 107 N. C., 58. See *Harshaw v. Dobson,* 64 N. C., 384; *S. c.,* 67 N. C., 203. We find no error in the conclusion that upon the verdict as returned the plaintiff is entitled to judgment.

The other exceptions are so manifestly untenable as to require no discussion.

No error.

VIRGINIA-CAROLINA POWER COMPANY v. JOB TAYLOR.

(Filed 26 September, 1928.)

1. **Trial—Issues—Form and Sufficiency in General.**

Exceptions to the issues submitted by the judge to the jury in an action of ejectment are untenable when it appears on appeal that the issues submitted fully embrace all issuable matters raised by the pleadings and supported by the evidence, and fully embrace all the contentions of the parties.

2. **Estoppel by Deed—Operation in General.**

Where the defendant's title is derived by mesne conveyances under a grant he is estopped to deny the validity of the plaintiff's title under the same grant on the ground that it lacked a seal.

3. **Adverse Possession—Nature and Requisites—Burden of Proof.**

The burden is on the claimant to show adverse possession when relied on by him, and upon his failure to show his possession adverse to plaintiff, who holds the paper title, it will be presumed that he holds under the plaintiff's title.

4. **Same—Distinct and Exclusive Possession.**

Evidence of casual fishing in nonnavigable waters from time to time does not alone amount to such adverse possession of the lands covered by the water as will ripen title against the one showing a perfect chain of paper title thereto.

APPEAL by defendant from *Daniels, J.*, at April Term, 1928, of NORTHAMPTON. No error.

Civil action in ejectment to recover possession of a tract of land, containing 97 acres, located in the bed of Roanoke River, a nonnavigable stream. Said land, other than Sturgeon Island, is covered by water.

The issues submitted to the jury were answered as follows:

"1. Is the plaintiff the owner and entitled to the possession of the tract of land described in the complaint, other than Sturgeon Island? Answer: Yes.

"2. If so, is the defendant in the wrongful and unlawful possession of the said land? Answer: Yes.

"3. Is the plaintiff the owner and entitled to the possession of the tract of land described in the complaint and known as Sturgeon Island? Answer: Yes.

"4. If so, is the defendant in the wrongful and unlawful possession of said land? Answer: Yes.

"5. If so, what damage is the plaintiff entitled to recover of the defendant? Answer: $18.00."

From judgment on the verdict defendant appealed to the Supreme Court.

George C. Green for plaintiff.

Burgwyn & Norfleet, Travis & Travis and C. R. Daniel for defendant.

CONNOR, J. This action was begun in the Superior Court of Northampton County on 16 September, 1922. Three appeals from judgments rendered at three several trials in said Superior Court have been heretofore heard and disposed of by this Court, each appeal resulting in a new trial. See 188 N. C., 351, 124 S. E., 634; 191 N. C., 329, 131 S. E., 646; 194 N. C., 231, 139 S. E., 381. This appeal is from the judgment rendered at the last trial, at April Term, 1928, of said Superior Court.

Assignments of error based upon exceptions taken and presented on this appeal have been carefully considered; they cannot be sustained. The judgment must be affirmed.

The issues submitted by the court to the jury arise upon the pleadings. They present to the jury every phase of the controversy between the parties; the answers to these issues are determinative of all essential matters involved in the controversy. Upon these issues each party to the action was able to present and did present to the court and to the jury each and all of his contentions both as to the facts and as to the law applicable to the facts as found by the jury. There was no error with respect to the issues. In *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349, it is said: "Issues are sufficient when they submit to the jury proper inquiries as to all the essential matters or the determinative facts of the controversy. The form of the issues is of little or no consequence, if those which are submitted to the jury afford each party a fair chance to present his contention in the case, so far as it is pertinent to the controversy. Issues should be framed upon the pleadings, and not upon the evidence." It is not error for the trial judge to so form the issues which arise upon the pleadings that the contentions of the parties, upon the evidence, may be clearly presented to and passed upon by the jury. This was done upon the trial of this case.

Assignments of error based upon exceptions to instructions of the court to the jury relative to the first and second issues cannot be sustained. All the evidence pertinent to these issues supports the contention of the plaintiff that each of these issues should be answered in the affirmative. The evidence shows a grant from the State, covering the land described in the complaint, and mesne conveyances of said land to the plaintiff. There is no exception in the record to the grant offered in evidence by the plaintiff. Indeed, the evidence tends to show that defendant derives his title from those claiming under this grant. He is therefore estopped from denying the validity of the grant for want of a seal. *Gilliam v. Bird,* 30 N. C., 280. Having established his legal title to the land referred to in the first issue, plaintiff, by virtue of the statute, is entitled prima facie to possession. C. S., 432. There was no evidence tending to show such possession by the defendant of the land involved in the first issue as the law requires to defeat the title of plaintiff or its right to possession under such title. The evidence relied upon by defendant tends to show only that persons claiming under those from whom he contends that he derived title, from time to time, caught fish in traps placed by them in the river; this evidence falls short of that held in *Williams v. Buchannan,* 23 N. C., 535, to be sufficient to show possession of land covered by the waters of a nonnavigable river. In that case it is held that "acts of dominion continuously exercised over this sluice by keeping up fish traps therein, erecting and repairing dams across it, and using it every year during the fishing season for the purpose of catching fish did constitute an unequivocal possession thereof." The evidence in this case does not show that any dams were placed in the river, or that traps for catching fish were maintained continuously therein, on the land involved in the first issue.

With respect to the third and fourth issues, the court instructed the jury as follows:

"I charge you to answer the third issue, 'Yes,' and the fourth issue 'Yes,' if you find the facts to be as testified to by all the witnesses, and as shown by the records introduced in the case, unless the defendant by the greater weight of the evidence has satisfied you, the burden being upon him to do so, that he and those to whose rights he has succeeded, has been in the continuous, open, notorious, adverse possession of Sturgeon Island under known and visible lines and boundaries for a period of twenty years prior to the commencement of this suit."

This instruction is sustained by the opinion in this case, upon a former appeal. 194 N. C., 231. We there said, that when the plaintiff in ejectment shows title to the premises, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence. Otherwise the defendant's occupation is deemed to be under and in subordination to the legal title. There was a conflict in the evidence with respect to the possession of Sturgeon Island. Plaintiff having established prima facie a legal title to said island, the burden was upon defendant to show by the greater weight of the evidence such possession as will defeat plaintiff's title and right to possession. This the defendant failed to do.

There was no error in the instruction of the court to the jury, defining the possession which defendant was required by the law to show in order to defeat plaintiff's title to Sturgeon Island.

The judgment is affirmed. There was

No error.

SOUTHERN DISTRIBUTING COMPANY v. WILLIE G. CARRAWAY ET AL.

(Filed 26 September, 1928.)

1. **Estoppel by Judgment—In General—Res Judicata.**

   Where it has been formerly adjudicated by final judgment of a court of competent jurisdiction that an execution on a judgment against husband and wife severally will not issue against their land held by them by entirety, the matter is *res judicata*, and operates as an estoppel between the same parties in a subsequent action brought upon the same subject-matter, involving the same question.

2. **Appeal and Error—Nature and Grounds of Appellate Jurisdiction—Motion for New Parties in the Supreme Court.**

   A motion to make new parties so as to change the character of the action, when made for the first time in the Supreme Court, will be denied.

APPEAL by plaintiff from *Daniels, J.*, at February Term, 1928, of GREENE.

Civil action to set aside certain deeds as well as deeds of trust and to have judgment held by plaintiff declared a prior lien on the lands described in said instruments.

The essential facts are as follows:

1. At the November Term, 1923, Greene Superior Court, the plaintiff herein, Southern Distributing Company, Inc., procured a judgment against "Emma R. Carraway and Willie G. Carraway, trading as East Carolina Supply Company, and Emma R. Carraway, Henry T. Carraway, and Willie G. Carraway, individually," for $7,894.59, with interest and costs, the same having been entered by consent following a compromise between the parties.

2. Execution was issued on this judgment and the question arose, on exceptions filed by the plaintiff to the return of the appraisers appointed to allot and value the homestead of the defendants therein, as to whether a house and lot situate in the town of Snow Hill was subject to execution under said judgment, it being alleged by the plaintiff herein, the Southern Distributing Company, Inc., "that said house and lot was owned by Henry T. Carraway and Willie G. Carraway, husband and wife, as tenants by the entirety, under and by virtue of a deed executed by W. T. Carraway to Henry T. Carraway and wife, Willie G. Carraway."

3. It was held in said proceeding, as reported in 189 N. C., 420, 127 S. E., 427, that the house and lot in question, alleged by the plaintiff, admitted by the defendants, and found by the court, to be vested in Henry T. Carraway and wife, Willie G. Carraway, as tenants by the entirety under the deed now sought to be set aside, could not be sold under execution to satisfy the judgment rendered therein.

4. Thereafter, in June, 1925, Willie G. Carraway filed a voluntary petition in bankruptcy, listed the plaintiff's judgment as one of her liabilities, of which the plaintiff was lawfully notified, and on 7 September, 1925, the said Willie G. Carraway duly received her discharge in bankruptcy and was released from any further liability on account of plaintiff's judgment.

5. Later, in 1925 and 1926, two deeds of trust, covering said premises, were executed by Henry T. Carraway and wife, Willie G. Carraway, one to secure a loan of $2,000 from the Jefferson Standard Life Insurance Company, and the other to secure a loan of $300 from the National Bank of Granville County.

6. This suit, instituted since the above proceedings and transactions, is brought by plaintiff to have the entirety deed, above mentioned, set aside as void, and Willie G. Carraway declared the sole owner of said property, and the plaintiff's judgment decreed a prior lien over the deeds of trust held by the defendants Insurance Company and National Bank.

7. Several defenses were interposed, one upon the ground of *res judicata* or estoppel by judgment.

From a judgment holding that Henry T. Carraway and wife, Willie G. Carraway, are owners of the *locus in quo* as tenants by the entirety under the deed in question, and that the discharge in bankruptcy, above mentioned, is a bar to plaintiff's suit, the plaintiff appeals, assigning errors.

John G. Anderson and Walter G. Sheppard for plaintiff.
George W. Lindsay and J. Paul Frizzelle for defendants.

STACY, C. J., after stating the case: Without considering all the grounds upon which the judgment is based, as it is unnecessary to do so, we think the defendants' plea of *res judicata,* or estoppel, is valid. A claim made or position taken in a former action or judicial proceeding estops the party making such claim to take a conflicting position or to make an inconsistent claim in a subsequent action or judicial proceeding to the prejudice of his adversary, where the parties are the same and the same questions are involved. 16 Cyc., 799. Defining estoppel by judgment, *Pearson, J.,* in *Armfield v. Moore,* 44 N. C., 157, says: "The meaning of which is, that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed. . . . In other words, his mouth is shut, and he shall not say that is not true which he had before in a solemn manner asserted to be true."

In the former proceeding it was alleged by the plaintiff therein, also plaintiff herein, admitted by the defendants therein, also defendants herein, and found as a fact by the court, to which no exception was taken, that the particular property here in question was held by Henry T. Carraway and wife, Willie G. Carraway, as tenants by the entirety, under and by virtue of the deed now sought to be set aside, and, in consequence of this fact, it was declared that the said tract of land was not liable to be taken under an execution to satisfy plaintiff's claim, as the defendants, husband and wife, held the property as tenants by the entirety, and plaintiff's judgment was rendered against them individually, and not jointly and severally. *Distributing Co. v. Carraway,* 189 N. C., 420, 127 S. E., 427.

The parties, the subject-matter, and the object sought are the same in both proceedings; and it may be stated as a general rule that a party is not permitted to take a position in a subsequent judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, when the later position disadvantages the adverse party. *Hardison v. Everett,* 192 N. C., 371, 135 S. E., 288; *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644; *In re Will of Lloyd,* 161 N. C., 557, 77 S. E., 955. Such was the holding in *Edwards v. Baker,* 99 N. C., 258, 6 S. E., 255, accurately stated in the headnote as follows: "A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having the same object in view, although the form of the latter and the precise relief sought therein is different from the former."

And further, it is well established by a long line of decisions that when a court of competent jurisdiction renders judgment in a cause properly before it, such judgment estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward. *Ferebee v. Sawyer,* 167 N. C., 199, 83 S. E., 17; *In re Lloyd's Will,* 161 N. C., 557, 77 S. E., 955; *Tuttle v. Harrill,* 85 N. C., 456.

The rule is stated in *Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 961, as follows: "It is well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing," citing the following authorities for the position: *Gilliam v. Edmonson,* 154 N. C., 127; *Tyler v. Capehart,* 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; *Fayer-*

weather v. Ritch, 195 U. S., 277; *Aurora City v. West,* 74 U. S., 82, 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., p. 1502-4-6.

Applying these principles to the facts of the instant case, we think the plaintiff's action was properly dismissed.

Affirmed.

PER CURIAM. The plaintiff's motion to make new parties so as to change the character of the action, lodged for the first time in the Supreme Court, must be denied.

O. H. ROEBUCK v. J. M. SHORT AND THE FARMERS BANK.

(Filed 26 September, 1928.)

1. **Courts—Superior Courts—Jurisdiction—Actions on Contract—Actions in Tort—Justices of the Peace.**

To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful and unlawful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort, and a demurrer to the jurisdiction of the Superior Court should not be sustained. Const., Art. IV, sec. 27; C. S., 1436, 1473, 1474.

APPEAL by plaintiff from *Grady, J.,* at March Term, 1928, of PITT. Reversed.

Action to recover one hundred dollars, the property of plaintiff, wrongfully and unlawfully taken from his possession by defendants.

From judgment dismissing the action upon demurrer *ore tenus* to the complaint, plaintiff appealed to the Supreme Court.

Julius Brown for plaintiff.
Albion Dunn for defendant.

CONNOR, J. After the jury had been empaneled to try the issues arising on the pleadings in this action, and after the pleadings had been read, defendant demurred *ore tenus* to the complaint, for that upon its face the court was without jurisdiction of the subject-matter of the action. C. S., 511, sec. 1, and C. S., 518. Decision of the question thus presented was reversed, and plaintiff proceeded to offer evidence. Before plaintiff had rested the court announced its opinion that the action is founded on contract, and that as the sum demanded in the complaint was less than two hundred dollars, to wit, one hundred dollars, the Superior Court did not have original jurisdiction of the action. In accordance with this opinion, the demurrer *ore tenus* was sustained. Judgment dismissing the action was rendered, and plaintiff, having duly excepted, appealed therefrom to the Supreme Court.

The question presented for decision by this Court is whether the cause of action alleged in the complaint is founded on contract, or whether it arises out of a tort. If the action is founded on contract, the Superior Court was without jurisdiction, and the judgment dismissing the action must be affirmed, for the reason that exclusive original jurisdiction of an action founded on contract, wherein the sum demanded does not exceed two hundred dollars, is conferred by the Constitution of this State upon a justice of the peace. Const., Art. IV, sec. 27; C. S., 1473. If the cause of action arises out of a tort, the Superior Court had original jurisdiction, and the judgment must be reversed, for the reason that, as the property in controversy exceeds in value the sum of fifty dollars, the Superior Court alone had exclusive original jurisdiction. Const., Art. IV, sec. 27; C. S., 1436; C. S., 1474. If the cause of action alleged in the complaint can be fairly treated as arising out of a tort, plaintiff having elected to bring his action in the Superior Court, the jurisdiction of the Superior Court should be sustained. *Furniture Co. v. Clark,* 191 N. C., 369, 131 S. E., 731. The decision of this question involves only the cause of action, as alleged in the complaint; the evidence offered by plaintiff cannot be considered, in deciding the question presented by the demurrer *ore tenus,* for the reason that the demurrer raises the question only as to whether the Superior Court was without jurisdiction upon the face of the complaint.

The facts alleged in the complaint, as constituting the cause of action upon which plaintiff demands judgment against the defendants, are as follows:

On 22 January, 1924, plaintiff, a farmer living in Pitt County, sold tobacco at a warehouse in the town of Greenville, in said county. He received for his tobacco a check for the sum of $342.50, drawn on defendant, The Farmers Bank, located in said town of Greenville; plaintiff presented said check to said defendant bank for payment; defendant, J. M. Short, assistant cashier of said bank, accepted said check, for his codefendant, and paid to plaintiff for said check the sum of $242.50 in currency; plaintiff, before he left the window through which the currency was handed to him by said defendant, Short, ascertained that he had been paid only $242.50, and immediately demanded the balance due, to wit, $100. The defendant, Short, insisted that he had paid to plaintiff the full amount due him, to wit, $342.50. After some discussion, the said defendant agreed that if, upon balancing his cash at the close of the day's business, he should discover that he had made an error, as contended by plaintiff, he would send plaintiff, through the mail, a check for $100.

On 23 January, 1924, plaintiff, who lived in the country several miles from Greenville, received a letter from defendant, Short, advising him that said defendant had discovered that he had made an error on the day before, as contended by plaintiff. A cashier's check for $100, payable to the order of plaintiff, was enclosed with the letter, in payment of the balance due to plaintiff on the check of the warehouse. Plaintiff collected this check the next day through another bank in Greenville, and took the money paid him to his home in the country.

The fourth, fifth and sixth paragraphs of the complaint, in which plaintiff's cause of action is set out, are as follows:

"Fourth. That on 25 January, 1924, while the plaintiff was away from home, the defendant, Short, came to the home of the plaintiff, and wrongfully and unlawfully demanded the said one hundred dollars of plaintiff's wife. That said defendant was very insistent in his demand for said one hundred dollars, and said that he must have it, and used profane language on the premises, and plaintiff's wife was frightened, and under such circumstances, upon said unlawful demand of the defendant, Short, she delivered said one hundred dollars of the plaintiff's money to the defendant, Short.

"Fifth. That the plaintiff is advised, informed and believes, and on such information and belief alleges that the defendant, Short, is an employee and assistant cashier of the defendant, The Farmers Bank, and in all the above transaction the defendant, Short, was acting as the agent and representative of The Farmers Bank, and for that reason the defendant, Short, and the defendant, The Farmers Bank, are jointly and severally liable to the plaintiff for said one hundred dollars and interest on the same from 25 January, 1924, which they are wrongfully withholding from plaintiff.

"Sixth. That the one hundred dollars which the defendant, Short, wrongfully and unlawfully obtained from the wife of plaintiff was the absolute property of the plaintiff, and the defendants, nor either of them, had any right or interest whatever in or to the same, and the obtaining of the same from the wife of plaintiff, in the absence of the plaintiff, was a gross fraud and imposition on the rights of the plaintiff, and the plaintiff is advised, informed and believes that the plaintiff is entitled to recover same of the defendants as any other property which they might wrongfully withhold from plaintiff."

The cause of action alleged in the complaint arises out of the wrongful and unlawful conduct of defendants by which said defendants wrongfully and unlawfully obtained possession of plaintiff's property; plaintiff does not waive the tort, and sue upon an implied contract of defendants to pay to him money had and received to his use. He demands the recovery of his property, to wit, one hundred dollars, now in the possession of defendants, as the result of their wrongful and unlawful conduct.

Upon the authority of *Mitchem v. Pasour,* 173 N. C., 487, 92 S. E., 322, approved in *Furniture Co. v. Clark,* 191 N. C., 369, 131 S. E., 731, the judgment dismissing the action upon the ground that the cause of action alleged in the complaint is founded on contract, and does not arise out of tort, and that, therefore, the Superior Court was without original jurisdiction of the action, is

Reversed.

STATE v. L. W. YELVERTON.

(Filed 26 September, 1928.)

1. **Husband and Wife—Abandonment—Elements of Crime—Instructions.**
   Where there is sufficient evidence that the husband, indicted under C. S., 4447, had by his cruel conduct caused his wife to leave his home with the minor children of the marriage, a charge to the jury that leaves out wilfulness as an element of the offense is reversible error to the defendant's prejudice.

APPEAL by defendant from *Grady, J.,* at June Term, 1928, of GREENE.

Criminal prosecution tried upon a warrant charging the defendant with abandonment and nonsupport of his wife and children in violation of the provisions of C. S., 4447.

The defendant and his wife have been married twenty-five years. They have four minor children, the youngest 12 and the oldest 20 years of age. It is the contention of the State that the prosecutrix and her children were forced to leave the defendant's home because of cruel and barbarous treatment, while the defendant contends that his wife and children left of their own volition and without just cause.

The prosecutrix testified on cross-examination as follows: "I concluded that my children and I could get along better without him, and we left him. He told us he had house rented for us, but I told him I could not stay and would not do it. . . . I didn't want any other house; I only craved peace."

It is also contended that the defendant has failed to support his wife and children in an adequate manner since their separation in January, 1928, but it is the position of the defendant that he is not required to furnish a home other than the one in which he lives or to support them elsewhere.

On the substance of the two offenses, the court charged the jury as follows:

1. "If the husband, by his acts and conduct at home, renders the life of his wife miserable and intolerable to such an extent that she cannot live with him peaceably, or without danger to her life or person, and she leaves him for that reason, and no other, and he thereafter fails to maintain and support her, he is just as guilty of abandonment as if he had left her himself."

2. "The second charge is a failure to support the children—his children. On that count in the bill, gentlemen of the jury, I charge you that upon his own evidence he is guilty. He admits on the witness stand that he has not contributed anything at all to the support of his three children, three minor children, since January, 1928, except ten dollars. He cannot refuse to support his children because his wife left him, that is, without just cause, because even if the wife were to blame, and she leaves him and takes with her the children, that does not relieve him of the obligation to maintain and support the children, and he admits he has not done it, and if you believe him, gentlemen, you should return a verdict of guilty of abandoning his children."

The defendant excepts to these instructions and assigns them as errors.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. F. Thomson and J. Paul Frizzelle for defendant.

STACY, C. J., after stating the case: It will be observed that the vital element of wilfulness, necessary to constitute an abandonment under the statute, is omitted from both instructions assigned as errors. The language of the statute is as follows: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor." C. S., 4447.

Speaking to a similar situation and interpreting the statute in *S. v. Johnson,* 194 N. C., 378, 139 S. E., 697, it was said: "An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide 'adequate support for such wife, and the children which he may have begotten upon her.' *S. v. Toney,* 162 N. C., 635; *S. v. Hopkins,* 130 N. C., 647. The abandonment must be wilful, that is, without just cause, excuse or justification. *S. v. Smith,* 164 N. C., 475. And both ingredients of the crime must be alleged and proved. *S. v. May,* 132 N. C., 1021."

It is conceded by the learned Assistant Attorney-General, Mr. Nash, that the instruction with respect to the alleged abandonment of the children is erroneous. *S. v. Bell,* 184 N. C., 701, 115 S. E., 190.

New trial.

LILLIE F. HODGES ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 26 September, 1928.)

1. Railroads—Right of Way—Nature and Extent of Easement.

Where a railroad company is given a deed to its right of way for all necessary railroad purposes, the question of necessity is primarily one for the railroad company.

2. Same—Injunctions.

In an action to restrain a railroad company from building houses for the use of its foremen and section hands, employed in the necessary upkeep of railroad property, on a plot of ground deeded to it for all necessary railroad purposes, a temporary order restraining the company from building such houses until the final hearing should not be granted without a finding of fact that the company had not exercised its right in good faith, and was not using the land for necessary railroad purposes.

APPEAL by defendants from order of *Nunn, J.,* at Chambers, in Smithfield, N. C., dated 25 April, 1925. Modified and affirmed.

Action to recover damages for trespass upon land and to enjoin and restrain defendants perpetually from entering upon said land, for the purpose of building fences or erecting buildings thereon; or for the purpose of cultivating the same.

From order continuing a temporary restraining order to the final hearing, defendants appealed to the Supreme Court.

Godwin & Williams and E. F. Young for plaintiffs.
J. C. Clifford and Rose & Lyon for defendants.

CONNOR, J. Plaintiffs are the owners in fee of a certain strip of land, described in the complaint, 43 feet wide, and 1,595 feet long, situate in Averasboro Township, Harnett County, North Carolina.

Prior to 1 January, 1928, plaintiffs were in possession of said strip of land cultivating the same for agricultural purposes. The defendant, Atlantic Coast Line Railroad Company, owns a right of way over and across the land of plaintiffs. The said right of way includes the strip of land described in the complaint. Prior to 1 January, 1928, said defendant had not entered upon, occupied or used said strip of land for any purpose. The defendant, D. A. Sykes, is a section foreman of said company, in charge of the section of its tracks and roadbed, which is located upon the right of way over and across plaintiff's land.

The defendant, Atlantic Coast Line Railroad Company, owns its right of way over and across plaintiff's lands, which include the strip of land described in the complaint, under a deed dated 15 June, 1883, which was duly registered on 22 January, 1886. The easements and privileges connected with said right of way, and conveyed by said deed, are described therein as follows:

"A free and perpetual right of entry, right of way, and easement at any and all times for the purpose of surveying, locating, building, constructing, using, operating, altering, improving and repairing the said branch line of railroad, its depots, warehouses, station houses, bridges, and all necessary erections and for all other purposes necessary and convenient for the operation and the business of the said branch road."

Early in January, 1928, the defendant, Atlantic Coast Line Railroad, entered upon the strip of land described in the complaint, built a fence around it, and erected thereon a small house or shanty, for use and occupancy by its section hands. Said defendant contemplates the erection, in the near future, of other houses and shanties to be occupied and used by its section hands. Defendants allege that the house or shanty heretofore erected, and the houses or shanties which it intends to erect on said strip of land, for the purposes aforesaid, are necessary for and convenient to the operation and business of said company. They deny that said defendant has used or contemplates using said strip of land for agricultural purposes. Plaintiffs allege that said houses are not necessary for railroad purposes, but that they have been or will be erected to enable the defendants to use said strip of land for other purposes, to wit, agricultural purposes.

In the order continuing the temporary restraining order to the final hearing, defendants are enjoined and restrained not only from cultivating said strip of land, but also from erecting or building thereon any new shanties, buildings or fences until the final hearing. It is ordered, however, the defendants "may use and occupy the house already erected on said land, with the yard in front of said house and the back yard, and a space ten feet north and south of said house, at each end, such occupancy to be maintained until the final hearing. But this occupancy shall not prejudice the plaintiffs in contending for their alleged rights to the entire strip of land described in Article 3 of the complaint at the final hearing."

The right of the defendant, Atlantic Coast Line Railroad Company, to enter upon said strip of land, at any time, and to occupy and use the same for any and all purposes reasonably necessary for and convenient to the operation of its business as a railroad company is clearly recognized and established by authoritative decisions of this Court. *Hodges v. Western Union Telegraph Co.*, 133 N. C., 225, 45 S. E., 572. The erection of houses and shanties on said strip of land by defendant to be used and occupied by its employees, while engaged in work for said defendant as section hands, is manifestly both convenient and necessary to the operation of its business as a common carrier, by railroad. However, whether or not, the use or proposed use of its right of way by a railroad company is necessary for railroad purposes is primarily, at least, a matter to be determined by the company, in the exercise of its judgment. *R. R. v. Olive*, 142 N. C., 257, 55 S. E., 263. In the absence of a finding, supported by evidence, that the use and occupancy of its right of way is not necessary for railroad purposes, and that such use is in bad faith, and not the result of the honest exercise of its judgment, the courts will not interfere with such use and occupancy. It is the duty of a railroad company to keep its roadbed and tracks in good repair; in order to perform this duty, it is necessary for the company to keep in its employment foremen and section hands readily available for the work of repairing said roadbed and track. It cannot be held as a matter of law that houses and shanties, located on its right of way, for the use and occupancy of such foreman and section hands, are not reasonably necessary for the proper performance of the duty which defendant owes to its patrons and to the public. Defendant does not contend that it has the right to enter upon and to use its right of way or any part thereof for agricultural purposes; it denies that it has or intends to use said strip of land for such purposes.

It was error to enjoin and restrain defendants from erecting or building upon its right of way new shanties, buildings or fences, enclosing said houses and reasonable yards connected therewith. The order must be modified in accordance with this opinion. As thus modified, the order is

Affirmed.

IN RE ESTATE OF ARTHUR PRUDEN.

(Filed 26 September, 1928.)

1. **Appeal and Error—Record—Matters to be Shown by Record—Remand.**

Where sufficient facts do not appear in the record on appeal for the Supreme Court to properly pass upon the matters of law presented, the case will be remanded.

2. **Same—Evidence—Statutes of Foreign Jurisdictions.**

Where the United States government has paid into a court of this State the proceeds from a policy of War Risk Insurance on the life of deceased soldier, and from the record it is inferable that the deceased soldier was a resident of another State at the time of his death, but not stated with sufficient certainty, the case will be remanded, as the law of the State in which he died domiciled will control the question of descent and distribution involved in the case, of which statute the courts here will not take judicial notice, and it is required that the statute be properly proven, if applicable.

CIVIL ACTION upon an agreed statement of facts, heard by *Small, J.*, 3 August, 1928. From GATES.

In substance the agreed statement of facts is as follows: Arthur Pruden, a soldier in the American Army, contracted for and received from the Bureau of War Risk Insurance a certificate or policy of insurance in the sum of $5,000, in which said policy the mother of the soldier, to wit, Mary Elizabeth Brothers, was named as sole beneficiary. Arthur Pruden died intestate on 26 January, 1920, leaving a mother, the said Mary Elizabeth Brothers, a sister, Ada Pruden Harrell, and a brother, Richard Pruden. The mother, as beneficiary, received payments from the Treasury Department upon said policy until her death 26 December, 1920. Thereafter the Bureau of War Risk Insurance "notified Richard Pruden and also Ada Harrell, that they were designated as beneficiaries by Arthur Pruden to whom the insurance was issued, and entitled to receive insurance in payments of $14.37 per month from 27 December, 1920, to 27 January, 1940." Richard Pruden, brother of the deceased soldier, is still receiving the award of $14.37 per month. Ada Harrell, sister of the deceased, received her award of $14.37 until her death 19 March, 1926. Ada Harrell left her surviving a husband, George Harrell, and two children, to wit, Carmen Harrell, 9 years of age, and Mary Harrell, 5 years of age. F. L. Nixon was duly appointed administrator of the estate of the deceased soldier, Arthur Pruden, on 1 January, 1927, and the Bureau of War Risk Insurance paid to said administrator the sum of $1,901, which represented the principal of the unpaid installments awarded Ada Harrell.

Upon these facts the brother of the soldier, to wit, Richard Pruden, claims one-half of said sum as next of kin of the deceased soldier. The minor children of Ada Harrell claim said fund through their mother, Ada Harrell.

The clerk of the Superior Court, after hearing the argument of counsel, held that the minor children of Ada Harrell were entitled to said fund. Whereupon Richard Pruden appealed to the judge. The judge reversed the order of the clerk and held that Richard Pruden was entitled to one-half of said amount, and the children of Ada Harrell entitled to receive the other half. From this judgment the children of Ada Harrell appealed, assigning error.

John Hill Paylor for Richard Pruden.
J. M. Glenn for the children of Ada Harrell.

BROGDEN, J. The law governing the distribution of War Risk Insurance has been declared by this Court in *Branch Banking and Trust Co. v. Brinkley, Administrator of the Estate of Jack W. Montague, ante,* p. 40. This action, however, must be remanded to the Superior Court of Gates County for the reason that essential facts are not disclosed in the record. In the first place, it appears in the agreed statement of facts that the deceased soldier, Arthur Pruden, died in Pennsylvania, and a certain exhibit from the United States Veterans Bureau, dated 25 March, 1927, indicates that the last legal residence of deceased was Pennsylvania. The domicile of the deceased soldier at the time of his death must appear. If the deceased soldier was domiciled in Pennsylvania at the time of his death, then the record must show the intestate law of that State at the time of the death. The statute law of another State is a fact to be shown because this Court cannot take judicial notice thereof. *Hilliard v. Outlaw,* 92 N. C., 266; *Mottu v. Davis,* 151 N. C., 237, 65 S. E., 969; *Carriage Co. v. Dowd,* 155 N. C., 307, 71 S. E., 721.

The record further discloses that the certificate or policy of insurance issued to the deceased soldier named his mother, Mary Elizabeth Brothers, as sole beneficiary, and in another place in the record it appears that Richard Pruden and Ada Harrell were designated as beneficiaries by the deceased soldier. These contradictory declarations in the record, without explanation, are confusing.

The cause is remanded to the Superior Court of Gates County to the end that the essential facts may be found and judgment entered thereon in accordance with the law as declared in the case of *Branch Banking and Trust Co. v. Brinkley, supra.*

Remanded.

ESTHER G. WINGATE v. J. O. CAUSEY.

(Filed 26 September, 1928.)

1. **Bills and Notes — Actions — Defenses — Evidence Sufficient to go to Jury.**

Evidence by the payee, in an action against him to recover upon a post-dated check "for value received" that it was given in payment for a pair of mules, and that the check was to be cashed only in the event that the parties agreed that the mules were to be sold for cash, but upon certain terms of credit if sold on credit, and that the latter was agreed upon, should be submitted to the jury, and a judgment rendered on the admission of the defendant that he executed the check is erroneous.

2. **Malicious Prosecution—Termination of Prosecution.**

Where in the plaintiff's action to recover upon a check given by the defendant, and protested at the bank upon which it was drawn, the defendant sets up a counterclaim upon the ground that the plaintiff wrongfully and maliciously had him arrested, etc., it is necessary for the defendant to show the termination of the proceeding in his favor, as well as malice and want of probable cause.

APPEAL by defendant from *Grady, J.*, at March Term, 1928, of PITT.

Civil action to recover on a $400 check given to plaintiff by defendant, 3 February, 1922, "for value received," which went to protest.

In defense it was alleged, and there was evidence tending to show, that the check in question, which was post dated, represented the purchase price of a team of mules or horses, but was not to be used unless defendant sold said team for cash; otherwise, if sold on time, the check was to be taken up with good paper, which defendant says was offered, and, while first refused, was later reduced to judgment and assigned to plaintiff's principal by agreement, in settlement of said check.

Defendant also set up a counterclaim for malicious prosecution, in that, it is alleged, plaintiff wrongfully and maliciously had him arrested and arraigned before the Superior Court of Wilson County for uttering a worthless check.

From a judgment sustaining a demurrer to the counterclaim, and holding that the evidence offered in defense of plaintiff's claim was not sufficient to defeat a recovery, defendant appeals, assigning errors.

No counsel appearing for plaintiff.
S. J. Everett for defendant.

STACY, C. J., after stating the case: We think the evidence offered in defense of plaintiff's claim was sufficient to carry the case to the jury, and that the court erred in rendering judgment on the defendant's admission that he issued the check held by plaintiff. The credibility of such evidence, however, is for the jury to determine. *Evans v. Cowan,* 194 N. C., 273, 139 S. E., 434.

But as it is not alleged that the criminal prosecution, which forms the basis of defendant's claim for damages for malicious prosecution, terminated in favor of the defendant, there was no error in sustaining the demurrer to the counterclaim. *Winkler v. Blowing Rock Lines,* 195 N. C., 673, 143 S. E., 213; *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577. Three things must be alleged and proved in an action for malicious prosecution: (1) malice, (2) want of probable cause, and (3) termination of proceeding upon which the action is based. *R. R. v. Hardware Co.,* 138 N. C., 174, 50 S. E., 571.

Error.

JAMES M. SMITH v. M. R. RITCH AND H. A. LAWING, PARTNERS IN BUSINESS UNDER THE FIRM NAME AND STYLE OF RITCH & LAWING.

(Filed 26 September, 1928.)

1. **Master and Servant—Liability of Master for Injury to Servant—Safe Place of Work.**

The master is required, within the exercise of ordinary care, to furnish his employee a reasonably safe place to do the work required of him under the terms of his employment, and for such failure, when the proximate cause of an injury, the master is held liable in damages.

2. **Same—Ordinary Tools.**

While the master is not ordinarily responsible in damages resulting from the use of simple tools in the ordinary way, it is otherwise when he fails to furnish him with a safe place to work, and he is ordered by the employer's vice-principal to continue to work under unsafe conditions, which proximately causes the injury in the action.

3. **Same—Evidence Sufficient to go to Jury.**

Where the *alter ego* of the employer would not permit the employee, a carpenter, to build a scaffold upon which to stand while nailing planks on a building above his head, and to do his nailing by reaching out of a window in the building, preventing the use of his two hands, and the evidence tends to show that the safer way was by building the scaffold; and by leaning out of the window the employee's eye was brought in close proximity to the nail being driven, and the nail, owing to this cramped position, was likely to glance: *Held,* evidence sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to deny defendant's motion as of nonsuit.

4. **Same—Assumption of Risk—Instructions—Issues.**

Under the facts of this case, where damages are being sought for an alleged negligent injury caused by the use of ordinary tools in an unusual way, with evidence that the negligent failure of the employer to furnish his employee a reasonably safe place to work and the negligent order of the employer's *alter ego* to do the work, involving the issues of negligence, contributory negligence, and assumption of risk: *Held*, the submission of the question of assumption of risk in the charge of the court upon the issue of contributory negligence, without submitting the issue of assumption of risk separately is not prejudicial or reversible error.

5. **Negligence—Acts or Omissions Constituting Negligence—Anticipation of Injury.**

Where a personal injury is inflicted on the employee by the negligent failure of his employer to furnish him a safe place to work, it is not required, for recovery of damages, that the particular injury should have been foreseen, if it could have been reasonably anticipated that injury or harm might have followed the wrongful act.

6. **Master and Servant—Liability of Master for Injuries to Servant—Methods of Work—Evidence.**

Where the question involved in a personal injury action against an employer, involving the question as to the common method of doing the work at which the employee was at work at the time: *Held*, evidence as to the usual methods of work was not prejudicial or reversible error under the facts of this case.

APPEAL by defendants from *Harding, J.*, at Special Term of MECKLENBURG. No error.

This was an action for actionable negligence brought by plaintiff against defendants. Plaintiff is a carpenter of twelve years experience, and was employed by defendants to help build an apartment house for which defendants had the contract. C. A. Hamilton was foreman in charge of the work. Plaintiff was working under him. Defendant, M. R. Ritch, as to the foreman's authority, testified, "They could either do what he told them or quit." He was engaged in applying storm-sheeting, or sheathing.

The material testimony of plaintiff is as follows: "Thompson and I started storm-sheathing and they put us on the lower side of the house. We storm-sheathed up to the foot of the windows, the window openings, and *I started to build a scaffold and Mr. Hamilton told me to go ahead and get it out of the windows.* I started to build a bench or scaffold to work on and Mr. Hamilton said to go ahead and get the storm-sheathing out of the windows—the openings to the windows. The building was about four or five feet off the ground. That threw the window about eight feet from the ground. I finished storm-sheathing to the windows and started storm-sheathing from there to the top of the first story, where the second story started. I was standing in the bathroom *window when the nail glanced.* I set the nail in the board. Mr. Thompson was sawing the boards and pushing them up to me. I started nailing and set it in the board and pushed it up to this place and reached out to nail it and the *nail glanced and hit me in the eye. I was building a scaffold or bench to stand on for safety. If I had had a bench or scaffold to stand on, I would have been behind the nail.* The board I was nailing was a wide piece. *If I would stand on the scaffold, I would drive it in straight and I would hold the nail.* When I was standing in the window, I would start the nail in the board, reach out and drive it in with the other hand. In standing on that window, it was something like two feet from the window to the point at which I was nailing. *I had to hold with one hand and hold the board also with it and nail with the other hand.* I had *only one free hand.* In standing on a scaffold, *I would have had two free hands.* I did not *bring a scaffold or bench because Mr. Hamilton told me not to do it.* Not a thing in the world was provided there for me to stand on except the window opening. The windows were not finished. There was just an opening. The framing was put up and the storm-sheathing on the outside was to be brick-veneered. I know the customary way of putting on storm-sheathing. Q. What is that custom? (Defendants object; objection overruled; defendants except.) A. To have a proper place to work, bench or scaffold. (Defendants move to strike out the answer; motion overruled; exception.) When the nail flew out, it struck me in the eye. It just knocked me pretty near senseless." The doctor took his eye out. "I now have a glass eye.".

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendants as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his injury as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $6,500."

The other necessary facts and assignments of error will be stated in the opinion.

James A. Lockhart and Walter Clark for plaintiff.
Tillett, Tillett & Kennedy for defendants.

CLARKSON, J. The first material assignment of error made by defendants: At the close of plaintiff's evidence, and at the conclusion of all the evidence, defendants made a motion for judgment as in case of nonsuit. C. S., 567.

In *Nash v. Royster,* 189 N. C., at p. 410, *Stacy, C. J.,* said: "It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'"

The court below overruled the motions, and in this we think there was no error.

C. A. Hamilton, the foreman of the defendants, and a witness for them, stated on cross-examination, without objection by defendants, "If a man hanging around holds with one hand and nails with the other, it is a *pretty precarious place.* As to whether or not it is pretty dangerous depends upon the man, whether he is careless about it or not. *It is dangerous anyway to be hanging around in that way.*" Plaintiff's manner and method of doing the work was in accordance with the command of his superior, whom he was bound to obey or quit. Hamilton *was the alter ego. Patton v. R. R.,* 96 N. C., 455; *Davis v. Shipbuilding Co.,* 180 N. C., 74.

Hoke, J., in *Thompson v. Oil Co.,* 177 N. C., at p. 282-3, says: "Not only is an employer supposed, as a rule, to control the conditions under which the work is done and to have a more extended and accurate knowledge of such work and the tools and appliances fitted for same, but the order itself given by the employer or his vice-principal directing the work and the natural impulse of present obedience on the part of the employee are additional and relevant facts to be considered in passing upon the latter's conduct in reference to the issue. Accordingly, several of the cases just cited are in illustration and support of the position that there is or may be a distinction in weighing the conduct of the employer and employee even when the principal objective facts are open to the observation of both. Thus, in *Patton v. R. R., supra* (96 N. C., 455), defendant was held liable for a negligent order which caused an employee to jump from a moving car, while the employee, obeying the order, was relieved of responsibility. The ruling apposite was stated as follows: 'One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, if not appearing to the servant at the time that obedience would certainly cause injury, it was held that there was no such contributory negligence as would prevent a recovery.'" See cases cited in *Robinson v. Ivey,* 193 N. C., 805.

In *Howard v. Oil Co.,* 174 N. C., at p. 653, it is said: "It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss, who stands towards the aggrieved party in place of vice-principal. *Ridge v. R. R.,* 167 N. C., 510; *Myers v. R. R.,* 166 N. C., 233; *Holton v. Lumber Co.,* 152 N. C., 68; *Noble v. Lumber Co.,* 151 N. C., 76; *Wade v. Contracting Co.,* 149 N. C., 177." *Robinson v. Ivey, supra.*

The rule is so well settled that it hardly bears repeating, but it is well stated by *Brodgen, J.,* in *Jefferson v. Raleigh,* 194 N. C., at p. 481: "The law of this State is that an employer of labor is required to exercise ordinary care in providing employees with reasonably safe methods and means to do the work for which they are employed. Thus, in *Noble v. Lumber Co.,* 151 N. C., 76, it is said: 'It is elementary learning that it is the duty of the master to furnish his servant a reasonably safe method, as far as practicable, for doing his work.' Again, in *Terrell v. Washington,* 158 N. C., 282, it is held: 'The master fails to supply a safe place for work if he allows work to be conducted there in a manner needlessly dangerous to servants.' To the same effect is the ruling in *Tate v. Mirror Co.,* 165 N. C., 273, as follows: 'Whether it was practical for the defendant to use any other device than a metal pipe for the purpose of insuring safety to its employees, and whether ordinary prudence required the use of it, were questions for the jury, which were properly submitted to them. If the situation called for the use of a different device, and this would have appeared to the ordinarily careful man, under the same circumstances, it was the duty of the defendant to supply it, instead of needlessly subjecting his servant to danger.' The opinion of the Court, quoting from *Smith v. Baker,* A. C., 325, proceeds: 'An employer is bound to carry on his operations so as not to subject those employed by him to unnecessary risk, and he is not less responsible to his workmen for personal injury occasioned by a defective system of using machinery than for injury caused by defect in the machinery itself.' *Thomas v. Lawrence,* 189 N. C., 521."

On the question of proximate cause, in *Hudson v. R. R.,* 176 N. C., at p. 492, it is said: "That it is not required that the particular injury should be foreseen and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act." *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., 647; *Clinard v. Electric Co.,* 192 N. C., 736.

With the principles of law stated, what are the facts succinctly? The building was about 4 or 5 feet off the ground, the window was about 8 feet from the ground, about in reach of a man standing. The storm-sheathing was put up to the window as far as the average man could reach. Then plaintiff started to build a bench or scaffold to stand on to continue nailing on the storm-sheathing. Defendant's foreman, or vice-principal, stopped plaintiff. By standing on the scaffold plaintiff could drive the *nail in straight* and could hold the nail. He would have, as he expressed it, *two free hands.* He was stopped from doing the work this way and ordered by the foreman, or vice-principal, Hamilton, to nail from the window. The foreman said "the steadier and better place a man has to stand on to work, the safer he is." As regards the nailing from the window, the foreman, without objection, stated, "It is a pretty precarious place," also "it is dangerous anyway to be hanging around in that way," meaning from the window. Knowing the danger, the foreman, vice-principal, ordered plaintiff to do the work from the window—admitted by him to be a dangerous and precarious place. The obedient employee gets in the window. Thompson, his helper, was sawing the boards and pushing them up to him. He started the nail in the board and pushed the board in place, and reached out to nail it with his other hand. He had to hold with one hand and hold the board also with it and nail with the other hand. It was something like two feet to the point at which he was nailing. The method of doing the work brought his left eye in close proximity to the nail. When he hit the nail, it flew out and struck him in the left eye and destroyed it. He now has a glass eye.

It does not require any instruction to use a hammer and drive a nail. If that was the case here, the nonsuit should have been granted. Plaintiff's contention, as found by the jury, was that he was building a scaffold to use the hammer and drive the nails, but defendants' foreman stopped him from doing this. "I was building a scaffold or bench to stand on for *safety.*" He could have stood on the scaffold, could have held the nail and been behind it and kept it in place, and driven the nail from the front. He was stopped from doing it in this way and method, and ordered by the foreman to do it in such a way and method as the foreman says: *"If a man hanging around holds with one hand and nails with the other, it is a pretty precarious place."*

Hoke, J., in *Bunn v. R. R.,* 169 N. C., p. 651, says: "In several recent decisions of the Court it has been held that, while an employer is required, in the exercise of ordinary care, to provide for his employee a reasonably safe place to work, and furnish him with tools and appliances safe and suitable for the work in which he is engaged, the principle is chiefly insistent in case of 'machinery more or less complicated, and more especially when driven by mechanical power,' and does not always apply to 'the use of ordinary everyday tools, nor to ordinary everyday conditions requiring no special care, preparation or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result.' "

We adhere to the doctrine therein stated, but the facts in the present case come within the principle that there was "good reason to suppose that the injury complained of would result." Taking the combination of facts and circumstances—plaintiff's building the scaffold—with the logic of "safety first"—the orders of the foreman to desist and work from the window—the knowledge of the foreman that the method of using the simple tools, and to hold with one hand and nail with the other from the window, was precarious and dangerous. The sequence necessarily striking the nail, not from the front but from the side, with his left eye in close proximity to the nail—the foreman could reasonably anticipate that injury and harm would follow the wrongful act and it did—the loss of plaintiff's eye.

In *Hall v. Chair Co.,* 186 N. C., at p. 470, it is said: "Defense is interposed chiefly upon the ground that the machine was very simple; that the danger, such as it was, was open and obvious, and that the plaintiff assumed the risk of his injury. There was also a plea of contributory negligence. In fact, the pleas of assumption of risk and contributory negligence were both submitted under the second issue; and this, under authority of *Hicks v. Mfg. Co.,* 138 N. C., 319, is a matter which must be left largely to the legal discretion of the presiding judge." *Parker v. Mfg. Co.,* 189 N. C., 275; *Ledford v. Power Co.,* 194 N. C., at p. 104.

The assignment of error made by the defendants, that the court refused to submit an issue as to assumption of risk, we do not think can be sustained.

The court below charged fully as to assumption of risk on the second issue of contributory negligence.

The next material assignments of error were to the questions on the part of plaintiff with respect to custom used in connection with the application of sheathing. The defendants' evidence went fully into the same matter. From an analysis of the evidence on both sides, we do not think, on the present record, that it could be held prejudicial or reversible error. See *Shelton v. R. R.,* 193 N. C., p. 670; *Insurance Co. v. R. R.,* 195 N. C., 693.

The next material assignment of error is evidence in regard to liability insurance, we do not think can be sustained.

In *Luttrell v. Hardin,* 193 N. C., at p. 269, it is said: "It has been repeatedly held that the fact that a defendant in an actionable negligence action carried indemnity insurance could not be shown on the trial. Such evidence is incompetent."

The plaintiff was put on the stand in rebuttal. We think the material trouble complained of was brought about by the cross-examination of plaintiff. The court below refused in its legal discretion to order a mistrial on defendants' motion. See *Gilland v. Stone Co.,* 189 N. C., 783.

We have read with care the charge of the court below. The contentions are fully and fairly set forth in behalf of plaintiff and defendants. The law of negligence, proximate cause, contributory negligence and assumption of risk, are all clearly and accurately defined. The law applicable to the facts was thoroughly explained. On the record we can find

No error.

FANNIE M. PEEL, E. S. PEEL, MARY A. DANIEL, H. D. DANIEL, N. R. DANIEL, N. T. DANIEL, BELL HARDISON, J. M. HARDISON, HELEN HARDISON, W. G. HARDISON, FANNIE GETSINGER, P. E. GETSINGER, MYRTLE I. HUGH, AND JAS. R. DANIEL, BY THEIR GUARDIAN, HATTIE DANIEL, AND HATTIE DANIEL, v. ALTON B. COREY AND A. R. COREY.

(Filed 26 September, 1928.)

1. **Wills—Rights and Liabilities of Devisees and Legatees—Election.**

Where a devise of land is clearly stated in the will as unconditional, it may not be otherwise shown by parol that the devise was in lieu of other lands owned by the devisee, and thus put him to his election, or stop him from claiming under the will by his being present at the time the will was probated, and not making objection.

2. **Deeds and Conveyances—Requisites and Validity—Form and Contents —Notarial Seals.**

Where a deed in the chain of title of the plaintiff bears the certificate of the clerk of the court of the county of its registration that the instrument has been properly proved as appears from the foregoing seals and certificates, the presumption is against the defendant's contention to the contrary, and the validity of the deed will be upheld when it has been duly acknowledged before a notary public in due form, but not attested by his notarial seal, C. S., 3179, 3297, and, *Held,* no prejudicial error when the parties plaintiffs to the action are grantors and grantees in the deed.

3. **Descent and Distribution—Nature in General—Heirs Designated in Devise.**

A grandson of the devisor of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, even though he takes the same lands and interest under the devise that he would have taken under the descent had his father not been living, and he acquires a new estate by purchase, descendible to his heirs at law under the cannons of descent. C. S., 1654, Rules 4, 5, 6.

APPEAL by defendants from *Clayton Moore, Special Judge,* at January Special Term, 1928, of MARTIN. No error.

This is an action involving the title to about 150 acres of land, on the west side of the Jamesville and Washington Road in Martin County, N. C. It was alleged in the complaint that the plaintiff, Fannie M.

Peel, was the owner of a one-third undivided interest, the other plaintiffs are the owners of a one-third undivided interest, and the defendant, Alton B. Corey, is the owner of a one-third undivided interest. The defendants plead sole seizin, adverse possession for the statutory period and estoppel. The action was instituted to restrain defendants from cutting and removing timber from the land. It was tried on the theory as an action for partition.

Jesse Hardison owned about 1,300 acres of land on both sides of the Jamesville and Washington Road in Martin County. On 5 September, 1858, he executed a will leaving this real property (after the life estate to his wife) to his two grandsons, David R. and Jesse H. Hardison. After the death of Jesse Hardison the will was duly probated in 1859. David R. and Jesse H. Hardison went into possession of the land. The grandson Jesse H. Hardison never married and died intestate. He left surviving him David R. Hardison, the owner of one-half interest in the land and as his heirs at law to the other half (1) David R. Hardison and his sisters, (2) Mary Emily Hardison, (3) Sallie Ann Hardison, (4) Hannah Daniel and a half-brother, (5) John Edward Cook. Their mother married a Cook and had one child, John Edward Cook, and then married James Hardison, son of Jesse Hardison, and had the children above mentioned. James Hardison was the father of David R. and Jesse H. Hardison and was living at the death of his father, Jesse Hardison, who made the will and left the land to his two grandsons, David R. and Jesse H. Hardison.

It appears that Sallie Ann Hardison died intestate. John Edward Cook died intestate leaving as his heirs at law John S., T. C., and H. D. Cook. Then David R. Hardison died intestate some six or seven years ago, leaving (1) Mary Emily Hardison, (2) Hannah Daniel, who married W. H. Daniel, and (3) the children of John Edward Cook. After David R. Hardison's death, the two surviving sisters lived on the place. Mary Emily Hardison died leaving a will dated 26 June, 1923, probated 3 September, 1923. In item 2 of the will she devised to Alton B. Corey, defendant, "All of the land on the west side of the Jamesville and Washington Road, it being the residence on which I now live, including all of the buildings." In item 3 she says, "I leave the remainder of my land to be equally divided between all of the children of W. H. and Hannah Daniel and John Edward Cook." At that time she owned the interest in the land which she inherited from her brothers and sister. Hannah Daniel thereafter died, leaving a will, dated 5 February, 1925, probated 1 February, 1926. In it she gives to her seven living children and the child of her deceased son, James A. Daniel, "All my interest in David R. Hardison and Jesse Hardison tracts of land." On 24 December, 1925, John S., T. C., and H. D. Cook and their wives (the heirs of

John Edward Cook) conveyed all of their interest in the entire 1,300 acres to Noah T. Daniel and others, and on 25 March, 1927, Noah T. Daniel and others conveyed to Fannie M. Peel, the plaintiff, an undivided one-third interest in the lands on the west side of old Jamesville and Washington Road, the land in controversy. On 19 May, 1927, this action was brought alleging a tenancy in common, as follows: One-third in Fannie M. Peel, one-third in Noah T. Daniel and others, and one-third in Alton B. Corey in the land on the west side of the Jamesville and Washington Road.

The issue submitted to the jury and their answer thereto was as follows: "Are the plaintiffs the owners and entitled to two-thirds of the lands described in the complaint, as alleged? Answer: Yes."

The court below instructed the jury that if they believed the evidence and found the facts to be as testified to, they would answer the issue "Yes," otherwise "No." Numerous exceptions and assignments of error were made by defendant. The material ones and other necessary facts will be set forth in the opinion.

Ward & Grimes and B. A. Critcher for plaintiff.
A. R. Dunning for defendants.

Clarkson, J. From a perusal of the record the only material propositions of law that seem to be involved: (1) Is the estoppel plead by the defendants good in law? (2) Under the facts in this action in the chain of plaintiff's title is a deed duly acknowledged before a notary public in due form, but not attested by his notarial seal, competent as evidence tending to show title? (3) Do the children of John Edward Cook, the half-brother (half blood) inherit equally with those of the whole blood?

From the record plaintiffs' contention is that the land in controversy was owned by (1) Mary Emily Hardison, (2) Hannah Daniel, (3) John Edward Cook's children as tenants in common. That Mary Emily Hardison owned a third interest and she willed all her interest in the land on the west side of the Jamesville and Washington Road to defendant, Alton B. Corey, and that on the east side (or remainder) to the children of W. H. and Hannah Daniel and John Edward Cook. Plaintiffs claim that they are the owners of the two-thirds interest through Hannah Daniel and John Edward Cook. From the language in the will of Mary Emily Hardison, we can see nothing that would estop plaintiffs from making the claim. Nor do we think the evidence of the fact that Hannah Daniel was present when the will of Mary Emily Hardison was read and executed and what she said, if competent, indicated that the devise to the children of Hannah Daniel was conditioned upon Hannah Daniel surrendering to defendant, Alton B. Corey, her (Hannah Daniel's) interest in the land on the west side of the Jamesville and

Washington Road. The testimony on the subject, if competent, indicated only that Hannah Daniel and her husband "had talked it over and that was their mind, to give him the west side of the road anyhow, if they had anything to do with it." There is no sufficient language in the will, or otherwise, to base an estoppel.

The doctrine of estoppel is at some length set forth in *Winstead v. Farmer,* 193 N. C., at p. 410. It is there said: "The doctrine of estoppel by conduct as extracted from *Pickard v. Sears,* 6 A. & E., 469, and *Freeman v. Cooke,* 2 Ex., 654, may, without attempting scientific precision, be thus stated: Where one person by his words or conduct represents a certain state of things to exist, and thereby induces—no matter whether he intended it or not—another to alter his opinion, that other is not to be prejudiced by the perfidy or fickleness of the first person." *Cook v. Sink,* 190 N. C., 620; *Meyer v. Reaves,* 193 N. C., 172; *Trust Co. v. Collins,* 194 N. C., 363.

We do not think, from the facts, the principle of election applies. The principle is thus stated in 28 R. C. L. (Wills), sec. 318: "Where a testator, after devising property owned by him to one beneficiary, assumes to devise to another property belonging to the first devisee, the devisee of the property owned by the testator if he accepts the devise with knowledge of all the facts, is precluded from asserting a claim to his own property devised to the other beneficiary. In other words a legatee claiming under a will that devises away property of which he is owner can have the benefit of his legacy only upon renouncing in favor of the devisee his right to the property devised. The beneficiary must elect between keeping his own and taking what is given by the will. . . . In order to make a case of election, it is well settled that the intention of the testator to give that which is not his own must be clear and unmistakable. It is not, however, necessary that such intention should be expressly declared, but it may be gathered from the whole and every part of the instrument."

As to the second proposition: C. S., 3179, is as follows: "Official acts by notaries public shall be attested by their notarial seals." C. S., 3297, is as follows: "When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the Superior Court of the county in which the instrument is to be registered, the official seal shall not be necessary."

From an examination of the registered deed certified to this Court, we find the clerk of the Superior Court has the following certificate: "Do hereby certify that the due execution of the foregoing instrument has been properly proved, as appears from *foregoing seals and certificates.* Therefore let the instrument with the certificates be registered." The presumption is against defendants' contention. See *Johnson v. Lumber Co.,* 147 N. C., 249; *Roberts v. Saunders,* 192 N. C., 191.

It is contended by plaintiff: "Anyway, this deed is not essential to the plaintiff's recovery, as both grantors and grantees are parties plaintiff in this action and the cause of action would exist in favor of the grantors in the deed if the deed were excluded from evidence." The record so indicates. We see no prejudicial error to defendant in the assignment of error on this aspect of the case.

As to the third proposition, we think the children of John Edward Cook, the half-brother (half blood) inherit equally with those of the whole blood. The widow Cook had one child, John Edward Cook; she married James Hardison and had five Hardison children, the two grandsons to whom Jesse Hardison willed the land, viz.: (1) David R. Hardison, and (2) Jesse H. Hardison, and also (3) Mary Emily Hardison, (4) Sallie Ann Hardison, and (5) Hannah Daniel. James Hardison was living when his father, Jesse Hardison, died. David R. and Jesse H. Hardison were purchasers.

In *Yelverton v. Yelverton,* 192 N. C., at p. 617, *Brogden, J.,* says: "What is purchase in law? 'Purchase in law denotes the acquisition of an estate in lands by a man's own agreement or act in contradistinction to acquisition by descent from an ancestor. The popular signification of the word purchase, *i. e.,* to buy, falls far short of the comprehensive meaning given to the word by the law. If land be given to a man by deed or will, in fee or in fee tail, he is a purchaser. But there is this distinction in the case of a gift by will: If the ancestor devised his whole estate to his heir at law in the identical manner in which it would have descended to the heir if no devise had been made, the heir takes by descent and not by purchase. But he must take the same estate and in the same subject-matter to come under the rule.' Mordecai's Law Lectures, Vol. 1, 648." *Welch v. Gibson,* 193 N. C., at p. 689; *Clark v. Clark,* 194 N. C., 288. The land must be treated as a new acquisition by David R. and Jesse H. Hardison.

Pearson, J., in *Osborne v. Widenhouse,* 56 N. C., at p. 239, 240, says: "Noah Furr acquired the land in controversy as devisee under the will of his grandfather, Paul Furr. At the death of the devisor, Henry Furr, the father of Noah, was living, and would have taken the land as his heir, had he died without making a will; so Noah at the death of Paul, his grandfather, was not 'his heir or one of his heirs,' and, necessarily, took the land as a *purchaser* in its general sense, and not in the peculiar mode which, under the statute, is made to have the like effect as a *descent*. He took by devise, and could not have claimed as heir of his grandfather, had the latter died intestate. This is settled in *Burgwyn v. Devereux,* 1 Ire. Rep., 586, where the matter is fully elaborated, and the construction of the rule of descent is fixed. It follows that the land must be treated as a *new acquisition* by Noah Furr, and is transmitted to his uncles and aunts on the mother's side as well as those on the side of the father." See C. S., 1654, Rules 4, 5 and 6. *Paul v. Carter,* 153 N. C., p. 26, and *Noble v. Williams,* 167 N. C., 112, are not applicable under the facts in this case.

We can see no evidence of adverse possession from the facts appearing in the record. It may be that defendants only received the lamb's share, but we cannot disturb the well-settled devolution of real property.

For the reasons given in the judgment below, we find

No error.

JAKE WARD BATCHELOR, ADMINISTRATOR OF THE ESTATE OF B. W. BATCHELOR, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 September, 1928.)

1. Railroads—Operation—Injuries to Persons on Track—Negligence—Warnings, Watchmen, etc.

In an action against a railroad company to recover damages for a personal injury alleged to have been negligently inflicted by a collision with defendant's train at a country grade crossing of a county highway with defendant's railroad track, evidence that the defendant did not maintain a watchman, gates, or signal gongs at the place is not evidence of its actionable negligence when there is no evidence that such was necessary owing to unusual dangerous conditions existing at this particular place, such as obstructions to conceal the approach of trains, and where the evidence tends only to show that all the usual signs had been placed there, signals or warnings given, by the engineer, and the view was clear and unobstructed, and that the defendant was not otherwise negligent, a judgment as of nonsuit is properly entered.

2. Same—Evidence—Last Clear Chance.

Where the question involved in an action for damages against a railroad company for the negligent killing of plaintiff's intestate by a collision at a highway crossing is whether the defendant's engineer should have stopped his train after the collision in time to have avoided the killing, evidence of a witness who had had experience as a fireman, that the train could have been stopped within the distance after applying the brakes, but that he did not have knowledge as to the time required to apply the brakes is but a conjecture, and no sufficient evidence to be submitted to the jury in the absence of legal evidence as to the time it would have taken to apply the brakes.

3. Evidence—Hearsay—Res Gestæ.

The declarations of a party immediately after an accident are not admissible in evidence as a part of the *res gestæ* when it appears that the declaration was a narration of past occurrence rather than the facts talking through the party.

CIVIL ACTION, before *Midyette, J.*, at April Term, 1928, of NASH.

The plaintiff is the administrator of Ward Batchelor.

The evidence tended to show that plaintiff's intestate was a successful farmer, about 64 years old, and that on or about 22 December, 1924, he was returning from Nashville to his home and was driving his automobile. The road upon which plaintiff's intestate was traveling, runs parallel with the right of way of defendant railroad company for some distance until it gets about 150 feet from the crossing. Plaintiff's intestate was traveling west, and the train of defendant was traveling east. Hence a traveler on this highway, approaching the crossing, would be facing the train until he got about 150 feet from the crossing. At a point in the road forty or fifty feet from the crossing the traveler, by merely looking up, could have seen the train 125 yards off. At a point in the road 60 feet from the crossing "there is no obstacle or obstruction to anybody's sight for 275 yards up the track." There was a North Carolina stop-law sign at the crossing. There was also a "Stop, Look and Listen" sign. On the date specified, plaintiff's intestate approached the crossing traveling at a rate of speed estimated between 15 and 20 miles an hour. He was familiar with the crossing by reason of the fact that he had crossed the track of the defendant at that point four times a day for ten or twelve years. The evidence further tended to show that the deceased was also familiar with the schedule of trains. The evidence further showed that the train gave the proper signals for the crossing.

The highway crosses the railroad track diagonally. An eye witness, describing the collision, said: "The automobile ran up on the crossing and the train scooped it up on the cow-catcher, hitting the car from the right front, which made the right front of the car slide up on the cow-catcher and lift the rear wheels of the automobile on the track, or something like that. The train pushed the automobile down the track a distance of 154 feet, where the automobile struck a bridge which knocked the automobile off the track and loose from the engine. The side of the automobile was crushed." Plaintiff's intestate died a short time after being removed from the scene of the collision. The crossing is 191 feet from the corporate limits of the town of Nashville. The road from

Nashville to Spring Hope, upon which plaintiff's intestate was traveling, was a "much traveled road as a county road, but not as a highway." The train of defendant was composed of an engine, baggage car and one passenger coach.

At the conclusion of plaintiff's evidence there was judgment of nonsuit, and the plaintiff appealed.

Cooley & Bone, H. S. Ward and Stephen C. Bragaw for plaintiff.
Spruill & Spruill for defendant.

Brogden, J. Three questions are presented for decision:

1. Is the failure of a railroad company to maintain a watchman, gates, gongs or other devices at a public crossing in the country evidence of negligence in an action brought by a person injured by collision with a train at such crossing?

2. Was there evidence to be submitted to the jury on the question as to whether the engineer of the train could have stopped before hitting the bridge?

3. Was the statement of the engineer of the train after the collision admissible in evidence?

Upon the first question the plaintiff relies upon *Dudley v. R. R.,* 180 N. C., 34, 103 S. E., 905. The principle of law announced was as follows: "It was not error for the court to permit the plaintiffs to offer evidence that there was no automatic alarm, or gates, at the crossing, and the court properly left it to the jury to say, upon all the attendant circumstances, whether the railroad company was negligent in not erecting gates. It was incumbent upon the defendant to take such reasonable precautions as were necessary for the safety of travelers at public crossings. 22 R. C. L., 988. This was a question of fact for the jury. That the city authorities assented that a watchman should be stationed at the crossing was not conclusive upon the plaintiffs if, in the opinion of the jury upon the evidence, this was not sufficient protection to the public." This language interpreted without reference to the facts upon which the decision was based, perhaps supports the contention of plaintiff that it is the duty of railroad companies to install gates or gongs at all public crossings in the State, and that a failure to comply with this duty would be evidence of negligence in personal injury actions resulting from collisions with trains. However, it appears that the crossing involved was upon a much used street in the town of Washington, and that the vision of the traveler was obstructed by a warehouse. The *Dudley case* was relied upon as an authority in the case of *Blum v. R. R.,* 187 N. C., 640, 122 S. E., 562. In that case *Adams, J.,* concurred in the result, and *Stacy, J.,* while concurring in the result, calls attention to the fact that the question of the erection of gongs or gates at public crossings was not before the Court. Both the *Blum* and *Dudley cases* are cited in *Finch v. R. R.,* 195 N. C., 190, but not upon the point involved here. The leading authority cited in the *Blum case* for the position taken was *R. R. v. Ives,* 144 U. S., 408, 38 L. Ed., 485. In that case the Supreme Court of the United States thus declared the law: "It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as for instance, that it is in a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much traveled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The *Ives case* is cited with approval in *Northern Pacific R. R. Co. v. Moe,* 13 Fed., 2nd series, 377, in which it is declared: "While the necessity for a flagman or other warning at a crossing has usually been found by the adjudged cases to exist at railway crossings over busy highways in cities, . . . the test is the peculiar danger of the crossing, even if it be in a village. See *New York, S. & W. R. Co. v. Moore,* 105 F. 725, 45 C. C. A., 21." The subject is discussed in an extensive note in 16 A. L. R., p. 1273, where all the authorities are assembled and analyzed.

Applying these principles of law to the facts disclosed by the record, there is no evidence of obstruction existing at this crossing; neither is there evidence that the vision of a traveler was obscured by curves, embankments, buildings or other conditions, which rendered the crossing more than ordinarily hazardous, nor does the record disclose any condition of peculiar danger. Therefore, we hold that the failure of the defendant to maintain gates or gongs at this crossing was no evidence of negligence.

The plaintiff contends, however, that if the defendant was not guilty of negligence prior to the collision that the engineer should have stopped the train before the automobile was pushed against the bridge, resulting in the death of intestate. The evidence was that the bridge was 154 feet from the crossing. The question immediately arises: Could the engineer in the exercise of proper care have stopped his train within 154 feet? The only evidence upon this question was the testimony of a witness who had formerly worked for the railroad as fireman, flagman, baggagemaster and conductor. He stated that in his opinion "a train running at a speed of 20 or 25 miles an hour and carrying an automobile in front of it could be stopped in around 50 yards. Air-brakes are the means and appliances which are put in operation to stop the train. I know about air-brakes only by hearsay, and I do not know how long it would take to apply them, as I never was an engineer." The burden was upon the plaintiff to show negligence. The train ran 51 yards and 1 foot before hitting the bridge. According to the testimony of plaintiff's witness, it could have been stopped in "around 50 yards" after the brakes were applied. This testimony, in the absence of knowledge as to what length of time would be required to apply the brakes, amounts to no more than conjecture, and conjecture is not evidence.

The plaintiff again insists that certain statements made by the engineer after the automobile had been thrown from the train at the bridge, constituted evidence that no proper lookout was observed. This contention is based upon the evidence of witness Smith, who stated that he was near the depot when the collision occurred. The depot was approximately 800 feet from the bridge. When the witness arrived at the bridge the deceased was being taken from the car. The train "went about 32 or 33 yards by the automobile after it went off the bridge." The witness then went to the engine and found the engineer taking off the broken bumper of the engine. The engineer had just finished removing the bumper and was taking his wrenches to go down under the engine to do some work on the brakes. The testimony of witness is as follows: "When I first walked up he was taking off that piece and I said, 'Capt., it hit a hard lick,' and he said, 'Yes, it broke when it hit that bridge'—talking about the bumper piece. He said that happened when it hit the small bridge and crushed the car. He said he didn't see the man when it hit, but saw him right afterwards, when the automobile fell in front of him. He didn't see him when he hit him, but saw him right afterwards."

The only aspect upon which this evidence would be competent would be upon the theory that the statement of the engineer was a part of the *res gestæ*. The test as to whether a declaration is a part of the *res gestæ* depends upon whether the declaration was the facts talking through the party or the party talking about the facts. The subject is discussed in the following cases: *Harper v. Dail,* 92 N. C., 394; *Bumgardner v. R. R.,* 132 N. C., 438, 43 S. E., 948; *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *Young v. Stewart,* 191 N. C., 297, 131 S. E., 735.

We are of the opinion that under the well defined principles of law recognized in this jurisdiction that the statement of the engineer was the narrative by him of a past occurrence, and therefore not a part of the *res gestæ.*

Affirmed.

L. T. WHITE, EXECUTOR OF K. P. WHITE, v. J. B. MITCHELL, EXECUTOR OF MARY O. WHITE, ET AL.

(Filed 26 September, 1928.)

1. **Wills—Construction—Estates and Interests Created.**

Upon a devise of real and personal property to the wife during widowhood, the moneys of the testator in the bank go to her subject to the restrictions contained in the will, and while she may not dispose of them by will, she is entitled to whatever moneys she may have saved, arising from the *corpus* of the estate, and may so dispose of them.

2. **Same—Evidence.**

Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under C. S., 1795, based upon conversations with other living parties interested under the husband's will.

3. **Evidence—Hearsay—Communications with Decedent.**

A transaction or communication with a deceased person prohibited by C. S., 1795, does not include those with a living person interested in the result of the action.

4. **Same.**

Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: *Held,* testimony as to her receipt of the money from the crops is competent, not falling within the provisions of C. S., 1795, and does not affect the title to other money owned by her husband at his death and given to her for life by his will.

5. **Trial—Instructions—Exceptions—Appeal and Error.**

Exceptions must be taken at the time to the statement of the contentions of the parties by the trial judge in his instructions to the jury to be considered by the Supreme Court on appeal.

6. **Same.**

Exceptions to the instructions of the court to the jury must be prejudicial to entitle the appellant to a new trial.

7. **Costs—Persons Entitled—Judgments.**

Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs. C. S., 1241.

APPEAL by plaintiff and defendants from *Clayton Moore, Special Judge,* at January Term, 1928, of BERTIE.

K. P. White died 11 October, 1921, leaving a will by which he disposed of his property as follows:

"Item 2nd. I do lend unto my beloved wife, Mary O. White, all of my real and personal estate to her during her widowhood as my widow.

"Item 3rd. When my beloved wife, Mary O. White, ceased (ceases) to be my widow by death or marriage, I dispose of estate as follows: I do give and bequeath to my son Earnest P. White and to my son Danvil C. White all of land owned by me at the time of my death to be equaled divided between them to them and their heirs for ever the said Danvil C. White is to have the west side of said land include all buildings there on and the garden the said Earnest P. White is to have the east side of said land and division line to be run and layed of on the east side of the garden and lot on said land.

"I do give and bequeath to my son Earnest P. White and to my son Danvil C. White all of my Right and interest in horses and mules on hand at the time of my death to them and their heirs for ever and I do allso give to my son Lassie F. White one feather bed to him and his heirs for ever.

"I do give all of the balance of my personal property on hand at the time of my death to all of my children to be equeal divided among them to them and theirs heirs for ever and lastly I do hereby constitute and appoint my son Lefayth T. White my lawful Executor, etc."

The testator's wife, Mary O. White, died in August, 1924, leaving a will by which she bequeathed to her daughter, Eula Mitchell, five hundred dollars described as "money I have in the bank"; to her daughter, Rena Mitchell, five hundred dollars "out of the money that is in the bank"; to her granddaughter, Amelia White, one hundred dollars "out of the money that is in the bank"; to her son, L. T. White, ten dollars; and to her granddaughter, Eva Hughes, twenty-five dollars. All her property not disposed of was to be sold and the proceeds were to be divided between Eula and Rena Mitchell.

At the time of her death Mary O. White had a certificate of deposit for $1,354, with 4 per cent interest issued by the bank of Colerain. The bank paid the amount of the certificate to J. B. Mitchell, executor of Mary O. White.

The plaintiff contended that the money for which this certificate had been issued was a part of the estate of his testator, K. P. White, and brought suit to recover a judgment for the amount paid by the bank to J. B. Mitchell as executor. When the cause was tried the jury answered the issues as follows:

1. Are the defendants indebted unto the plaintiff as alleged in the complaint? Answer: Yes.

2. If so indebted then in what amount? Answer: $1,354 with interest since the .... day of ...., 192.....

It was thereupon adjudged that the plaintiff recover of the defendants, J. B. Mitchell, executor of Mary O. White, and the Peoples Bank and Trust Company of Colerain, the sum of $1,354 deposited in said bank in the name of J. B. Mitchell, executor, etc., with interest at 4 per cent per annum from 26 June, 1924. It was also adjudged that the plaintiff disburse the amount recovered in the due course of administration under his testator's will, and that the costs of the action be paid out of the fund on deposit in the bank.

The parties appealed upon error assigned in the record.

Winston, Matthews & Kenney for plaintiff.
Craig & Pritchett for defendants.

DEFENDANTS' APPEAL.

ADAMS, J. After the death of Mary O. White, was her executor entitled to the money for which the certificate of deposit had been issued by the bank? To this question a negative answer must be given if she came into possession of the money by virtue of her husband's will, because his property, real and personal, was given her "during her widowhood."

The plaintiff says that upon the death of Mrs. White the money became a part of the personal estate of his testator. He contends that his father and mother, both infirm, needed assistance and protection; that he had a conversation with J. B. Mitchell (who had married his sister) in reference to their condition; that he had previously received money from the farm and had put it in the bank first to the credit of his father and afterwards about two years before his father's death to the joint credit of his father and mother; that in consequence of their conversation he and J. B. Mitchell went to the bank a month after the death of his father and had the account credited to Mrs. White; and that all the money thus deposited had been derived from his father's farm. The plaintiff offered evidence in support of these contentions and the defendants excepted on the ground that the evidence is prohibited by section 1795 of Consolidated Statutes.

This section disqualifies any party to an action or any person interested in the event of the action, or any one under whom such party or person derives title, to testify in behalf of himself, or in behalf of the person succeeding to his title or interest, against the personal representative of a deceased person, or against the committee of a lunatic, or against any one deriving title or interest through such person or committee, concerning a personal transaction or communication between the witness and the deceased person or lunatic. *Bunn v. Todd,* 107 N. C., 266. The purpose is to exclude evidence of a personal transaction or communication between the witness and a person who by reason of death or lunacy cannot be heard. *Abernethy v. Skidmore,* 190 N. C., 66; *Haywood v. Russell,* 182 N. C., 711; *Reece v. Woods,* 180 N. C., 631.

The defendants' first twelve exceptions are addressed to evidence which does not involve any personal transaction or communication between the witness and his mother or his father; it relates to conversations or transactions between the witness and the defendant, J. B. Mitchell, and between the witness and the officers of the bank, all of whom are living. There is no evidence or suggestion that K. P. White or his wife had anything to say in reference to the recited transactions or indeed that either one of them knew what L. T. White and J. B. Mitchell had done. On cross-examination the defendants elicited evidence that the witness acted in behalf of his father and mother; but it does not appear that either his father or his mother had given him any instructions, or approved or disapproved, or even had knowledge of, anything he did. In fact his father had been paralyzed for about nine years and talked very little. Morever, the appellants after bringing out this evidence made no motion to strike out what the witness had previously said. These exceptions therefore must be overruled.

And so as to the thirteenth and fourteenth exceptions. The plaintiff admits that after the death of her husband Mrs. White was entitled to money derived from the sale of the crops. Her receipt of this money could not affect the question of title to other money owned by her husband at his death and given to her for life by his will. And on the matters in issue it is immaterial whether Mrs. White did or did not devise the "remainder of her estate" to the witness. This evidence could have had no material bearing on the verdict. Exception 16 relates to the judge's statement of contentions to which his mind was not directed during the trial, and exception 18 to an instruction that the plaintiff and the defendants could not lawfully agree to a settlement of the estate in breach of the will unless all the interested parties agreed. It is not easily perceived how the appellants could have been prejudiced by these instructions. There are other exceptions to the charge which become academic, as it is found as a fact and agreed that the verdict includes no personalty except money in the bank.

The appellants contend that there is error in the judgment; that Mary O. White was entitled to the income from the bequest, and that a part of the income has been awarded to the plaintiff. *Hall v. Robinson,* 56 N. C., 349; 18 C. J., 945. The plaintiff consents that the judgment may be modified so that he may recover interest only from the date of the widow's death.

A motion was made that the defendant executor be allowed to deduct from the recovery burial expenses and the fee of his attorney; but these matters were not pleaded or considered during the trial.

The motion for nonsuit was properly denied. The other exceptions are formal.

On the defendants' appeal there is no error except in the judgment, which is modified and affirmed.

PLAINTIFF'S APPEAL.

ADAMS, J. It was adjudged that the costs be paid out of the fund on deposit in the bank. This part of the judgment is erroneous. The plaintiff having recovered is entitled to his cost. C. S., 1241 *et seq.*

Error.

FRANCES JOHNSON, ADMINISTRATRIX OF MAURICE JOHNSON, DECEASED, v. THE HARRIET MILLS, INC.

(Filed 26 September, 1928.)

Appeal and Error—Review of Interlocutory Orders—Premature Appeals —Dismissal.

An appeal from an order for the examination of the agents of the defendant corporation under C. S., 900, in order to obtain information upon which to base the complaint, is premature and will be dismissed.

APPEAL from an order made by *Midyette, J.*, at Chambers. From VANCE.

Plaintiff instituted an action against the defendant, and after summons was served, filed an affidavit setting out a cause of action against the defendant for wrongful death and requesting the court to issue an order for the examination of certain alleged agents and employees of the defendant. The clerk of the Superior Court upon the affidavit issued an order directing the parties named in the affidavit to appear and be examined at the instance of the plaintiff. The defendant filed certain exceptions to the order of the clerk to the effect that the information sought by the plaintiff was not material and that the information desired by plaintiff was already available. From the order of the clerk the defendant appealed to the judge, who affirmed the order of the clerk, and found that the suit was regularly instituted, and that the proceeding for examination of agents and employees of defendant was sought in good faith and for the legitimate purpose of obtaining information from which to file the complaint. The judge further found "that the plaintiff has filed a duly verified affidavit setting forth sufficient facts to entitle her to examine the defendant for the purpose of obtaining information from which to file her complaint." Thereupon an order was made by the judge directing the parties named in the affidavit to appear and be examined before the clerk of the Superior Court. From this order the defendant appealed.

M. C. Pearce and Thomas W. Ruffin for plaintiff.
Perry & Kittrell and J. P. & J. H. Zollicoffer for defendant.

PER CURIAM. C. S., 900, provides that "where a corporation is a party to the action, this examination may be made of any of its officers or agents." When no pleadings have been filed the plaintiff by proper and sufficient affidavit may apply to the court for an order of examination. *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman,* 160 N. C., 11, 75 S. E., 1005; *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403. And when a proper order for such examination has been duly made, an appeal therefrom to the Supreme Court is premature and will be dismissed. *Ward v. Martin,* 175 N. C., 287, 95 S. E., 621; *Monroe v. Holder,* 182 N. C., 79, 108 S. E., 359; *Abbitt v. Gregory, ante,* 9.

Appeal dismissed.

R. A. WELLONS, TRUSTEE, v. A. G. JOHNSTON ET AL.

(Filed 26 September, 1928.)

Pleadings—Counterclaim—When Counterclaim May Be Set Up.

Where a corporation gives its note to its president to secure him against any loss he might sustain by reason of his endorsement of the corporation's notes, and the president transfers the note to a third person, who brings suit, the corporation may not set up as a counterclaim in the action indebtedness due the corporation by the president. C. S., 521.

APPEAL by plaintiff from judgment of *Daniels, J.,* dated 17 August, 1928. Affirmed.

This action was begun in the Superior Court of Johnston County to recover upon a note for the sum of $10,000.00, executed by defendants, and now held by plaintiff as assignee of E. F. Boyette, payee therein. It was referred to Hon. D. H. Bland for trial.

The note contains a clause reciting that it is "given to protect E. F. Boyette against any loss that he may sustain by reason of his personal endorsement on notes for the Farmers Warehouse, Inc., and also for any loss that he may sustain by reason of his personal securities which he has deposited to secure the obligations of the Farmers Warehouse, Inc. This note nor no portion of the same is to be paid except as the said E. F. Boyette proves that he has sustained a loss as outlined above." E. F. Boyette was the president, and the defendants were directors of said Farmers Warehouse, Inc., which has ceased to do business.

Defendants in their answer to the complaint plead certain alleged indebtedness of said E. F. Boyette to the Farmers Warehouse, Inc., as counterclaims in this action.

From judgment affirming an order of the referee overruling plaintiff's demurrer to said counterclaims, plaintiff appealed to the Supreme Court.

Wellons & Wellons for plaintiff.
Abell & Shepard for defendants.

PER CURIAM. The indebtedness of E. F. Boyette to Farmers Warehouse, Inc., alleged in the answer, and relied upon by defendants as counterclaims against plaintiff, do not constitute counterclaims within the meaning of the statute. C. S., 521. Whether or not such indebtedness may be established and considered in determining the amount, if any, for which defendants are liable to plaintiff, cannot now be decided. The decision must be reserved until the facts with respect to such indebtedness have been found by the referee and reported, with his conclusions of law, to the court. This is in effect the holding of the referee, as we construe his order. There is no error in the order as thus construed, and the judgment affirming same must be

Affirmed.

WARD & WARD v. DORA AGRILLO.

(Filed 26 September, 1928.)

1. **Trial—Verdict—Setting Aside Verdict.**
A verdict may be set aside out of term and out of the county under an agreement of counsel authorizing the judge to do so.

2. **Attorney and Client—Fees.**
Attorneys rendering services to a party litigant are entitled to at least nominal compensation in their action to recover upon *quantum meruit.*

APPEAL by defendant from order of *Harris, J.,* signed at Kinston, N. C., on 25 May, 1928. Affirmed.

This is an action to recover for professional services rendered to defendant, at her request, by plaintiffs, attorneys and counsellors at law, begun and pending in the Superior Court of Craven County. A former appeal by defendant to this Court was dismissed. 194 N. C., 321, 139 S. E., 451.

Judgment by default and inquiry was rendered by the clerk of said court on 25 July, 1927. At February Term, 1928, the action was tried, and the following issue was then submitted to the jury:

"What amount are plaintiffs entitled to recover of the defendant?"

This issue was answered, "Nothing." From an order signed by the trial judge at Kinston, N. C., on 25 May, 1928, setting aside the verdict as a matter of law, defendant appealed to the Supreme Court.

D. L. Ward, Whitehurst & Barden and W. B. R. Guion for plaintiffs.
Shaw & Jones and B. C. Beckwith for defendant.

PER CURIAM. We have examined the record and case on appeal in this action with care. The assignments of error, appearing in the case on appeal, and discussed in the briefs filed in this Court upon defendant's appeal, cannot be sustained. We find no error for which the order setting aside the verdict, as a matter of law, should be reversed. The order is affirmed.

The judge finds, as recited in the order, that it was agreed at February Term, 1928, of the Superior Court of Craven County that the court might take any action on the verdict out of term and out of the county that it could have taken during said term. Stipulations to this effect, signed by counsel, appear in the record. Both parties to the action were represented by counsel when plaintiff's motion to set aside the verdict was heard and signed at Kinston, N. C., on 25 May, 1928.

Defendant's exception to the judgment by default and inquiry, and her appeal therefrom, upon the facts appearing in the record, were abandoned. It does not appear that there is merit in the exception; the judgment by default and inquiry is valid. By virtue of said judgment plaintiffs are entitled to recover of defendant at least a nominal sum. As his Honor properly held, there was error on the trial for which the verdict should have been set aside as a matter of law. Upon the next trial the jury should be instructed that plaintiffs are entitled to recover of defendant at least nominal damages. C. S., 596, and cases cited.

Affirmed.

A. T. SUGG v. NORTH CAROLINA AGRICULTURAL CREDIT CORPORATION ET AL.

(Filed 3 October, 1928.)

1. Principal and Agent—Rights and Liabilities as to Third Parties—Ratification—Estoppel.

Where a depositor is permitted by the bank to draw on an anticipated deposit to be made from an expected loan from a third person, and the loan is made, the lender sending in care of the bank a check for the depositor, and upon receiving the check the bank endorses it for the depositor and places the amount to his credit, and thereafter the depositor draws on this deposit, with full knowledge of the facts: *Held*, the conduct of the depositor is a ratification of the endorsement by the bank, and he is estopped to deny this agency, and claim that the endorsement was without authority.

APPEAL by defendants from *Cranmer, J.*, at February Term, 1928, of LENOIR.

Civil action to have note of $6,000 given by plaintiff to the North Carolina Agricultural Credit Corporation delivered up and two certain crop liens executed to secure same canceled of record.

In the spring of 1925 the plaintiff obtained a loan from the North Carolina Agricultural Credit Corporation (hereafter called Credit Corporation) through C. L. Blount, cashier of the Snow Hill Banking and Trust Company. Plaintiff's note and crop liens were executed 3 February, 1925. The loan was finally approved, and, on 30 April the Credit Corporation drew its check on the Raleigh Savings Bank and Trust Company for the amount of $5,796.00, payable to the order of A. T. Sugg, and forwarded the same to the Snow Hill Banking and Trust Company.

Pending negotiations and anticipating favorable action on the part of the Credit Corporation, plaintiff was allowed to overdraw his account in the Snow Hill Banking and Trust Company with the understanding that the same was to be taken care of out of the funds derived from his expected loan.

The Snow Hill Banking and Trust Company received the check above mentioned on 4 May, placed the same to the credit of the plaintiff, notified him that his "money had come," and gave him, at his request, a memorandum of the amount. Plaintiff thereupon proceeded to draw checks against his account to the amount of approximately $4,000.00. Nearly $1,000.00 worth of these checks had been paid when the Snow Hill Banking and Trust Company closed its doors and ceased to do business on 15 May, 1925, with a balance of $4,717.29 to the credit of plaintiff's account.

The check in question, purporting to be endorsed by the payee, was deposited for collection at the National Bank of Goldsboro by the Snow Hill Banking and Trust Company, duly endorsed by the latter. The National Bank of Goldsboro thereupon forwarded said check to its correspondent bank in Raleigh, Wachovia Bank and Trust Company, for collection, duly endorsing same with "all prior endorsements guaranteed." The Wachovia Bank and Trust Company received said check 5 May, 1925, and on the same day it was paid by the drawee bank, Raleigh Savings Bank and Trust Company, and duly charged against the account of the Credit Corporation.

About six months thereafter the plaintiff made demand upon the Credit Corporation for the amount of his loan, claiming that he had never endorsed the check in question nor authorized any one to endorse it for him. The Credit Corporation denied any liability, and contended that if, in fact, the plaintiff had not personally endorsed said check, the same had been endorsed for him by the cashier of the Snow Hill Banking and Trust Company, with authority to do so, or, if not, that such action had enured to plaintiff's benefit, who, with knowledge of the facts, had ratified the transaction by checking upon the deposit placed to his credit in the Snow Hill Banking and Trust Company.

A previous loan during the year 1924 had been handled in the same way without objection on the part of the plaintiff, and plaintiff testified that he instructed Mr. Blount to get the present loan "like he got the one for me the year before." Blount had endorsed the first check and placed the amount to plaintiff's credit just as in the instant case.

Upon motion of the Credit Corporation all the banks which handled said check were made parties defendant in this action; and it was admitted by the National Bank of Goldsboro that if the nongenuineness of the endorsement by the payee of said check were established, it would be liable to the Wachovia Bank and Trust Company, by reason of its endorsement; and in turn the Wachovia Bank and Trust Company admitted its liability to the Raleigh Savings Bank and Trust Company, and the payee bank admitted its liability to the Credit Corporation in like circumstances.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning a number of errors, but relying chiefly upon the exception addressed to the refusal of the court to grant motion for judgment as in case of nonsuit.

Rouse & Rouse and Ely J. Perry for plaintiff.

Cale K. Burgess for defendant, North Carolina Agricultural Credit Corporation.

Thomas H. Calvert for defendant, Raleigh Savings Bank and Trust Company.

Biggs & Broughton for defendant, Wachovia Bank and Trust Company.

Teague & Dees and F. E. Wallace for defendant, National Bank of Goldsboro.

STACY, C. J., after stating the case: Conceding, without deciding, that the cashier of the Snow Hill Banking and Trust Company was not authorized by the payee to endorse the check in question, still we think the plaintiff must fail in his suit, if not upon the principle of ratification, then upon the doctrine of estoppel. The law will not permit him to take and to hold the fruits of what was done for him by the cashier of the bank and at the same time repudiate its consequences. *Bank v. Justice,* 157 N. C., 373, 72 S. E., 1016.

The substance of ratification is confirmation after conduct. 2 C. J., 467; *Parks v. Trust Co.,* 195 N. C., 453, 142 S. E., 473; *Waggoner v. Pub. Co.,* 190 N. C., 829, 130 S. E., 609. Here, the plaintiff, an intelligent business man, on being informed that the amount of his loan had been placed to his credit, proceeded to draw upon the deposit and to use it as his own. He must have known that the cashier had done whatever was necessary to place the funds to his credit. His conduct, under the circumstances, was tantamount to an adoption and confirmation of the endorsement made by the cashier who assumed to act as his agent at the time. *Starkweather v. Gravely,* 187 N. C., 526, 122 S. E., 297. He ought not to be heard now in repudiation of his previous conduct. *Lewis v. Nunn,* 180 N. C., 159, 104 S. E., 470.

"If certain acts have been performed or contracts made on behalf of another without his authority he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accept them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place." *Gallup v. Liberty County,* 57 Tex. Civ. App., 175, 122 S. W., 291.

The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824; 10 R. C. L., 688 *et seq.* Its compulsion is one of fair play.

He who is silent when it is his duty to speak, will not be permitted by the law to speak when such silence has made it his duty thereafter to remain speechless. *Hardware Co. v. Lewis,* 173 N. C., 290, 92 S. E., 13.

Upon the record we think the defendants' motion for judgment as of nonsuit should have been allowed.

Reversed.

STATE v. J. G. SWINSON.

(Filed 3 October, 1928.)

Criminal Law—Evidence—Weight and Sufficiency—Nonsuit.

In order for the State to convict a defendant of a criminal offense it must show guilt beyond a reasonable doubt, and the sufficiency of the evidence in law to take the case to the jury does not depend upon the doctrine of chances, and a trial for the destruction of certain pages of a book in the office of the register of deeds, C. S., 4255, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. C. S., 4643.

APPEAL by defendant from *Harris, J.,* at March Term, 1928, of ONSLOW. Reversed.

Indictment, containing three counts, each charging a violation by defendant and another of provisions of C. S., 4255, which are as follows:

"If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and wilfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, he shall be guilty of a misdemeanor."

The jury found that defendant is guilty, and that his codefendant is not guilty.

From judgment on the verdict, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Rouse & Rouse, Shaw & Jones and B. C. Beckwith for defendant.

CONNOR, J. On the trial of this action in the Superior Court of Onslow County, there was evidence on behalf of the State tending to show that the crime alleged in the indictment was committed by some person; that at some time during the three or four weeks preceding 16 January, 1928, some person went into the vault opening into the office of the register of deeds of Onslow County, and cut and removed from Book of Deeds, No. 26, pages 77 and 78; that there was registered on these pages a deed from Bryant Williams to Dr. Charles Duffy. These pages were in their proper place in said book on or about 1 September, 1927, when the attorney for the Duffy estate, who testified as a witness for the State, examined said book, and also at some time later during the fall of 1927, when a clerk in the office of the register of deeds examined said book, at the request of defendant, J. G. Swinson, and advised him that the deed from Bryant Williams to Dr. Charles Duffy was registered on said pages 77 and 78 of said book, No. 26. There is no evidence that the defendant had at any time seen the said book. Defendant cannot read.

There was evidence tending to show that defendant, J. G. Swinson, had an interest in the land described in the deed from Bryant Williams to Dr. Charles Duffy. Defendant had purchased said land at a tax sale made by the sheriff of Onslow County, on 5 October, 1925, and had taken a deed from said sheriff for said land. This deed was dated 3 August, 1927. The land was listed for taxes in the name of Bryant Williams Estate for the year 1925, subsequent to the date of the deed from Bryant Williams to Dr. Charles Duffy. On or about 1 September, 1927, defendant was informed by a letter from the attorney for the Duffy Estate of the existence of said deed, and that said deed was registered on pages 77 and 78 of Book No. 26, in the office of the register of deeds of Onslow County. This information was confirmed by the clerk in the office of the register of deeds, who at the request of defendant, examined said book some time three or four weeks prior to 16 January, 1928. The State contends that this evidence shows that defendant, J. G. Swinson, had a motive for destroying pages 77 and 78 of Book No. 26, on which the deed from Bryant Williams to Dr. Charles Duffy was registered.

There was evidence tending to show that defendant lives fifteen or eighteen miles from Jacksonville, the county-seat of Onslow County, at his home in the country; that on Friday, 13 January, 1928, defendant went to Jacksonville, and while there called at the office of the register of deeds, and requested permission to go into the vault, which opens into the office, saying that he wished to examine some records. Defendant cannot read, but was accompanied by his step-daughter, about 20 years of age, who can read, and who went into the vault with defendant. The register of deeds remained in his office, which was connected with the vault by a door, during all the time defendant and his step-daughter were in the vault together. During this time the door was open and the register of deeds could see and did see defendant, as he walked about in the vault. Upon ascertaining that defendant and his step-daughter were unable to find the record, for which they were searching, the register of deeds went into the vault and inquired of defendant what record he wished to find. Defendant replied that he wished to find the record of a mortgage in which he was interested. The register of deeds thereupon found the record, and gave defendant the information which he was seeking. The step-daughter was not in the vault when the register of deeds went in. Defendant said that she had just stepped out.

On Monday, 16 January, 1928, the register of deeds discovered that pages 77 and 78 were missing from Book No. 26. The evidence showed that these pages had been cut and removed from said book. Both the office of the register of deeds and the vault, in which the records were kept, were open on Saturday, 14 January, 1928, and were accessible to all persons who wished to enter either. Defendant's home was searched by the register of deeds and others within a few days after 16 January, 1928, for the missing pages. They were not found. There was evidence of conflicting statements made by defendant and his step-daughter as to whether she found the record of the mortgage for which defendant and his said daughter were searching prior to the time the register of deeds went into the vault. There was no other evidence tending to show that defendant is the person who cut and removed the pages from the book, or that he was present when they were cut and removed.

The State contends that the evidence shows not only that defendant had a motive to commit the crime alleged in the indictment, but also that he had an opportunity to do so, and that from these facts the jury could find that the defendant is the person who committed the crime, or at least that he was present, aiding and abetting his step-daughter, who found the pages in the book at the request of defendant. Defendant contends that in the absence of evidence tending to show beyond a reasonable doubt that the crime was committed on Friday, 13 January, 1928, there was error in the refusal of the court to allow his motion for judgment as of nonsuit. C. S., 4643.

There was evidence tending to show that pages 77 and 78 were last seen in their proper place in Book No. 26, by the clerk in the office of the register of deeds, three or four weeks prior to 16 January, 1928. The only opportunity, according to all the evidence that defendant had to cut and remove the pages, was on Friday, 13 January, 1928. Whether the crime was committed on that day, or on some other day between the time the clerk saw the pages in the book and 16 January, 1928, when the register of deeds first discovered that the pages were missing, is wholly a matter of conjecture and speculation. There is nothing more than a suspicion that the crime was committed on Friday, 13 January, 1928, the only day on which, according to the State's evidence, defendant had an opportunity to commit the crime. When the essential fact in controversy in the trial of a criminal action—in this case, the cutting and removal by defendant of the pages—can be established only by an inference from other facts—in this case, the motive and the opportunity to commit the crime—these facts must be established by the evidence beyond a reasonable doubt. Evidence which leaves the facts from which the inference must be made, matters of conjecture and speculation, is not sufficient to be submitted to a jury. The rule stated by this Court in *S. v. Vinson,* 63 N. C., 335, has been frequently approved. In that case *Rodman, J.,* says: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury." In *S. v. Prince,* 182 N. C., 788, 108 S. E., 330, *Walker, J.,* says: "We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies with the province of the court, the last within that of the jury. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances."

In this case there was no evidence legally sufficient to prove that defendant had an opportunity to commit the crime, alleged in the indictment, unless the jury should find beyond a reasonable doubt that the crime was committed on Friday, 13 January, 1928. In the absence of evidence from which the jury could so find, there was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. The judgment is therefore

Reversed.

RIDLEY WATTS, CHAS. H. MURPHY, ARTHUR R. JOHNSON, BENJAMIN S. DENNIS, C. WHITNEY DALL, AND DONALD B. STEWART, COPARTNERS, TRADING AS RIDLEY WATTS & CO., v. A. I. GROSS AND A. L. PEARSON.

(Filed 3 October, 1928.)

Guaranty—Construction and Operation—Debts Guaranteed.

Where the stockholders give a written guaranty in stated amounts for the debts of the corporation, and the corporation is dissolved, and the manager of the corporation opens a business in another city under the

same trade name, but in which the stockholders have no interest, the guaranty will not be extended to include the debts of the business thus operated, in the absence of some provision or stipulation clearly importing such extension.

APPEAL by plaintiffs from *Cranmer, J.*, at February Term, 1928, of LENOIR.

Civil action to recover on a written guaranty for merchandise shipped by plaintiffs to The Caswell Manufacturing Company, New Bern, N. C., during the months of November and December, 1923.

Plaintiffs are New York merchants and were doing business with The Caswell Manufacturing Company, a corporation with its principal place of business at Kinston, N. C., during the year 1922, and prior thereto. In the spring of 1922 the defendants executed to the plaintiffs a paper-writing or writings guaranteeing to the plaintiffs the payment of certain indebtedness due or to become due by the said "Caswell Manufacturing Company," as designated in one guaranty of $2,000 and "Caswell Manufacturng Company, Inc., Kinston, N. C.," as named in another guaranty of $5,000.

It is admitted that the corporation, the debts of which the defendants guaranteed, was regularly dissolved 12 July, 1923.

The account for which plaintiffs seek to hold the defendants liable on their written guaranties, is for goods shipped by plaintiffs to "Caswell Manufacturing Co., of New Bern, North Carolina," during the months of November and December, 1923.

It seems that A. A. Silverstein, who managed the corporation, "The Caswell Manufacturing Company," in Kinston, opened a business in New Bern under the trade name, "Caswell Manufacturing Company," some time after the dissolution of the corporation in Kinston. The defendants were stockholders in the Kinston corporation, but they had no interest in the New Bern business of A. A. Silverstein.

Upon the foregoing facts, which are admitted or not controverted, the court, being of opinion that the defendants were not liable to the plaintiffs on their guaranties, entered judgment as in case of nonsuit, from which the plaintiffs appeal, assigning error.

Dawson & Jones and H. P. Whitehurst for plaintiffs.
Cowper, Whitaker & Allen and Sutton & Greene for defendants.

STACY, C. J., after stating the case: We agree with the trial court that the guaranties of the defendants, given to secure the debts of the Kinston corporation, in which the guarantors were interested, cannot be held, on the facts of the present record, to cover the obligations of a business in

New Bern, conducted under a similar name, in which the defendants had no interest. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

A guaranty for the default of one person or firm is not to be extended to cover the default of another, in the absence of some provision or stipulation clearly importing such extension. 12 R. C. L., 1066; Note 19 L. R. A. (N. S.), 901.

Affirmed.

WILL TURNAGE v. CHARLES F. DUNN.

(Filed 3 October, 1928.)

1. Appeal and Error—Briefs—Dismissal.

The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his brief when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request.

2. Judges—Power to Render Final Order Outside of District—Injunctions.

The resident judge of the district in which an action is pending is without jurisdiction to pass upon the question of continuing a temporary restraining order to final hearing, over objection, outside the districts, his authority being limited to interlocutory orders that do not substantially affect the merits of the controversy.

APPEAL by defendant from *Grady, J.,* at Chambers, Beaufort, N. C., 14 June, 1928. From LENOIR.

Civil action to remove tax deed as cloud on title, and to restrain the defendant from interfering, in any way, with plaintiff's tenant now in possession of the premises described in the complaint.

A preliminary restraining order was signed by Hon. Henry A. Grady, resident judge of the Sixth Judicial District, but presiding at the time over the courts of the Fifth Judicial District, at Chambers in Greenville, Pitt County, 1 June, 1928, returnable before himself at Beaufort, Carteret County, 14 June following, at which time and place, over objection of defendant, the matter was heard and the injunction continued to the hearing. Defendant appeals, assigning errors.

S. H. Newberry for plaintiff.
Charles F. Dunn in propria persona.

STACY, C. J. Upon the call of the docket from the Sixth District, the district to which this case belongs, on 25 September, 1928, plaintiff lodged a motion to dismiss the appeal, for that, no carbon typewritten copy of appellant's brief was mailed or delivered to appellee's counsel as required by Rule 28 of the Rules of Practice in the Supreme Court. 192 N. C., p. 853. It appears, however, that the manuscript record and appellant's brief were received in the clerk's office 11 July, 1928, and mimeographed copies were available two or three days thereafter. No application was made to the clerk by appellee's counsel for copy of appellant's brief. It is not the duty of the clerk to see that copy of appellant's brief is furnished to appellee's counsel, except upon request duly made therefor. The motion to dismiss the appeal, therefore, must be denied.

This action was instituted in the Superior Court of Lenoir County 1 June, 1928, and, on the same day, the judge presiding over the Superior Court of Pitt County issued a temporary restraining order in the cause, returnable before himself at Beaufort in Carteret County fourteen days thereafter. The defendant objected to the matter being heard in Carteret County, especially as the Superior Court of Lenoir County was then in session, the same having convened 11 June for a two weeks term. We think the defendant's objection to the matter being heard out of the district was well taken, and that the judge was without authority to enter the order appealed from in Carteret County. *S. v. Crowder,* 195 N. C., 335, 142 S. E., 222.

The decisions are all to the effect that a judge of the Superior Court may not, even in his own district, except by consent, or when authorized by statute, hear and determine an adversary proceeding, or enter an order therein, other than interlocutory, substantially affecting the rights of the parties, outside the county in which the action is pending. *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609.

Error.

LELA HOOD v. CHARLES F. DUNN.

(Filed 3 October, 1928.)

Taxation—Tax Deeds—Action to Set Aside—Rents and Profits.

Where the plaintiff sustains his action to set aside defendant's tax deed under which defendant has been in possession of the lands, he must prove by his evidence the amount of rents the defendant has collected therefrom before he can recover them.

APPEAL by defendant from *Cranmer, J.,* at February Term, 1928, of LENOIR. New trial.

Action to remove cloud upon plaintiff's title to land, and for other relief.

From judgment on the verdict defendant appealed to the Supreme Court.

Sutton & Greene and Ely J. Perry for plaintiff.
Charles F. Dunn in propria sua.

CONNOR, J. There was no error on the trial of this action in the Superior Court, with respect to the first and second issues submitted to the jury. The judgment that the tax deed from W. B. Coleman, city clerk and tax collector of the city of Kinston, N. C., to defendant, Charles F. Dunn, dated 10 June, 1927, and recorded in the office of the register of deeds of Lenoir County, be canceled on the record and marked null and void, by the clerk of the Superior Court of Lenoir County, is affirmed.

However, there was error with respect to the third issue. No evidence appears in the case on appeal from which the jury could find that plaintiff is entitled to recover of defendant the sum of $111.00, for rents collected by him for the land described in the complaint. Defendant's assignment of error based upon his exception to the instruction of the court to the jury upon the third issue must be sustained. On this issue plaintiff is entitled to recover of defendant only the amount collected by defendant as rent for said land. With respect to the third issue, there must be a

New trial.

SUSAN ANNA LEE ET AL. v. R. M. BAREFOOT ET AL.

(Filed 3 October, 1928.)

1. **Evidence—Parol or Extrinsic Evidence Affecting Writings—Contradicting, Varying, or Explaining Written Instrument—Deeds and Conveyances.**

   Where title to land depends upon the sufficiency of the description, the deed will be upheld if possible, and unless the description is so vague and contradictory that it cannot be told what thing in particular is meant, parol evidence is admissible to identify the land, and a finding of fact, in an action for partition, that the deed in the instant case is not void for uncertainty of description is upheld under the facts of this case.

2. **Deeds and Conveyances—Construction and Operation—General Rules of Construction.**

   A deed must be construed as a whole so as to effectuate the intent of the parties as expressed in the whole instrument, and to this end apparent repugnancies will be reconciled, when possible by a fair and reasonable interpretation, and words may be transposed.

3. **Deeds and Conveyances—Construction and Operation—Boundaries of Property Conveyed.**

Where parol evidence is necessary to identify lands described in a deed, descriptive words should be construed to effectuate the intent of the parties, and where there is a discrepancy between the course and more certain descriptions, the latter will prevail.

4. **Same—Questions of Law—Questions of Fact.**

What lines constitute the boundaries of land described in a deed is a question of law for the judge; where the lines are is a question of fact for the jury under correct instructions based on competent evidence.

5. **Deeds and Conveyances—Construction and Operation—Estates and Interests Created.**

Where in the premises of a deed land is conveyed to B. and his heirs, and later "it being the intention of the grantor to convey to B. and his wife, C., an estate during their natural lives or the life of the survivor, to their use and benefit without punishment," with remainder over to their children, and in the habendum "to have and to hold . . . to B., his heirs and assigns to their only use and behoof forever" shows the intention of the parties to convey to B. and wife a life estate, and this intention will be given effect by a fair and reasonable construction, and the apparent repugnancy can be reconciled by construing the deed as conveying to B. for the use of himself and wife a life estate, the use being executed with remainder over to the children in fee.

6. **Same.**

Where a party is given a life estate by deed, "then the said land or any part thereof is intended to belong in fee simple to the children" does not give the holder of the life estate the right of alienation.

7. **Improvements—Right to Compensation Therefor—Partition.**

The right of a tenant in common to compensation for improvements placed upon land is not necessarily foreclosed by a judgment for partition.

8. **Partition—Actions for Partition—Proceedings and Relief—Sale for Partition.**

Whether, in an action for partition, a sale will best subserve the interests of the parties is a question of fact for the trial judge.

APPEAL by defendants from *Nunn, J.*, at April Term, 1928, of HARNETT. Affirmed.

This is a proceeding for the sale of land for partition. Trial by jury was waived, all parties agreeing that the court should find the facts and render judgment. The following facts and conclusions of law are set forth in the record:

1. Kenion Barefoot and Mary A. Barefoot, his wife, executed to Moses W. Barefoot a certain deed (duly probated and registered), which is as follows:

STATE OF NORTH CAROLINA—Sampson County.

This deed made this 21st day of December, 1881, by Kenion Barefoot and wife, Mary A. Barefoot, of Sampson County, and State of North Carolina, of the first part, to Moses W. Barefoot, of Harnett County and State of North Carolina, of the second part:

Witnesseth: That said Kenion Barefoot and wife, Mary A. Barefoot, in consideration of the sum of six hundred and twenty-five dollars to them paid by said Moses W. Barefoot, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey unto said Moses Barefoot and his heirs all the right, title, interest and estate of the party of the first part in and to a tract of land in Harnett and Cumberland counties, State of North Carolina, adjoining the land of D. Lee and Kenion as a part of the Killing land and others, bounded as follows, viz.:

Beginning at Delaney Lee's corner in A. F. Tart's line; thence with her line S. 18 W. 8 chains 70 links to her corner; thence S. 77 E. 2 chains 75 links between a pine and sweet gum, then direct to a persimmon tree on the crook of the land fence south of the crook in the fence and ginhouse; thence the same course as last line to the run of Mingo a line beginning 7 chains 75 links west of the stake and large red oak, runs S. by the cemetery to the run of Mingo striking the line from the persimmon tree to the swamp, but should the line from the persimmon tree reach the run of said swamp then and in that case the line is to run up said swamp until it reaches said line running south, thence said line true north the line running west from the oak; thence west to the beginning, containing 100 acres, more or less. It being the intention of the above-named grantor to convey to Moses W. Barefoot and wife, Zilphia D. Barefoot an estate during their natural lives or the life of the survivor to their use and benefit without punishment of any sort, and after their joint life estate shall have been determined the death of said joint tenants and survivors of them then the said land or any part thereof is intended to belong in fee simple to the children of said Moses W. Barefoot, Z. D. Barefoot, all that they may have hereafter.

To have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging to said M. W. Barefoot, his heirs and assigns to their only use and behoof forever. And the said Kenion Barefoot and wife covenant that they are seized of said premises in fee and have a right to convey the same in fee simple; that the same are free from all encumbrances; that they will warrant and forever defend the said title to the same against the claims of all persons whatsoever.

I, Kenion Barefoot, do except the use of said land as long as he seeth fit to use it, but this exception extends to no other person.

In testimony whereof said K. Barefoot and M. A. Barefoot have hereunto set their hands and seals the day and year above written.

KENION BAREFOOT. (Seal.)
M. A. BAREFOOT. (Seal.)

Attest: K. E. BAREFOOT.
S. BAREFOOT.

2. The deed of Kenion Barefoot referred to in the first finding of fact sufficiently describes the land therein mentioned to locate and identify the same. This finding is based upon the deed which was offered in evidence.

3. The petitioners contend that by said paper-writing the grantors conveyed to Moses W. Barefoot and Zilphia D. Barefoot an estate for their natural lives in the lands described in said paper-writing, and that the remainder was conveyed to the children of said Moses W. Barefoot and wife, Zilphia D. Barefoot, in fee simple.

4. The defendants contend that the paper-writing describes no land capable of being located or identified. They further contend that if any land is described and conveyed therein, that it was conveyed to Moses W. Barefoot in fee simple, at least that Moses W. Barefoot was given the power of alienation of said land.

5. That Kenion Barefoot and Mary A. Barefoot, his wife, were the parents of Moses W. Barefoot; that Zilphia D. Barefoot was the wife of Moses W. Barefoot, and that the *feme* plaintiff is the child of said Moses W. Barefoot and his wife, Zilphia Barefoot.

6. That Moses W. Barefoot died intestate on 29 April, 1921; that Zilphia D. Barefoot is still living; that this action was commenced by summons issued on 21 August, 1926; that there were born of said marriage of Moses W. Barefoot and wife, Zilphia D. Barefoot, five children, who survive them, to wit, the *feme* plaintiff, Susan Anna Lee, the defendant, R. M. Barefoot, Claudia Weeks, Jerome Core, and Mary Jackson.

7. That Moses W. Barefoot and wife, Zilphia D. Barefoot, on 5 November, 1892, and 7 December, 1892, executed and delivered to L. J. Best two mortgages conveying by the same description the lands described or attempted to be described in the deed of Kenion Barefoot and wife to Moses W. Barefoot above referred to, which mortgages were duly registered.

8. That thereafter the said two mortgages were duly foreclosed by sale of the land under powers of sale contained in said mortgages, and the land was conveyed by the same description to H. W. Jernigan by deed dated 12 April, 1897, which deed was duly recorded in Book 164, page 227, office of the register of deeds of Harnett County.

9. That the defendants, other than Zilphia D. Barefoot, by direct or mesne conveyances from H. W. Jernigan and Moses W. Barefoot and wife, Zilphia D. Barefoot, acquired the interest of Moses W. Barefoot and wife, Zilphia D. Barefoot, in the lands described in the deed set out in paragraph one above.

CONCLUSIONS OF LAW.

Upon the foregoing facts the court is of the opinion and concludes that the deed of Kenion Barefoot referred to in the first finding of fact sufficiently describes the land therein mentioned to locate and identify the same.

(2) By the deed referred to in the first finding of fact Moses W. Barefoot and Zilphia D. Barefoot, his wife, acquired a life estate in said lands, and their children the remainder.

(3) That Susan Anna Lee, subject to the life estate of Zilphia D. Barefoot, is the owner in fee simple of an undivided one-fifth part of said land.

(4) That the defendants, other than Zilphia D. Barefoot, own the life estate of Zilphia D. Barefoot, and an undivided four-fifths of the remainder.

(5) That an actual partition of the said lands cannot be made without injury to some or all of the parties interested.

It is thereupon ordered that Messrs. J. C. Clifford and A. A. McDonald be, and hereby are appointed commissioners of the court to advertise said land in some newspaper published in Harnett County, once a week for four weeks, and by posting notice of said sale at the courthouse for 30 days immediately preceding the day of the sale, and to sell the same at public auction to the highest bidder for cash at the front door of the Municipal Building in the town of Dunn, in said county, on such date as the commissioners may fix or appoint in the advertisement of said sale, and report their action in the premises to the clerk of this court for confirmation or other appropriate orders, in accordance with law and the usual practice of the court.

Defendants excepted and appealed upon error assigned.

Baggett & McDonald and Charles Ross for plaintiff.
McLeod & Smith and J. C. Clifford for defendants.

ADAMS, J. The errors assigned by the appellants impeach the sufficiency of the description in the deed to Moses Barefoot, the court's ruling as to the quantity of the estate conveyed by the deed, and the conclusion that actual partition of the land cannot be made without injury to the parties.

The appellants claim title to the land in controversy under the deed from Kenion Barefoot and his wife to Moses Barefoot; but we need not pause to inquire whether they are in a position to assert that the description in this deed is vague, uncertain, and void.

We do not understand the first conclusion of law to mean that the description is of itself sufficient to identify the land without the aid of parol evidence. When land is described by metes and bounds parol evidence is generally offered to identify corners, courses, lines, and natural objects; and when location as well as title is a point in issue such evidence is practically indispensable. The conclusion referred to, as we construe it, means only this: the description in the deed is not so indefinite as to require the trial court to withhold from the jury the question of location when supported by competent evidence tending to identify the boundaries and "to fit the description to the thing." It is a general rule that when title to land depends upon the sufficiency of the description the deed shall be upheld if possible, and shall be declared void only when the description is so vague or contradictory that it cannot be told what thing in particular is meant. *Proctor v. Pool,* 15 N. C., 370. Descriptive words, it is held, shall operate according to the intent of the parties in order to rectify manifest errors; and when there is a discrepancy between the course and more certain descriptions in the deed, the former must yield to the latter. *Cooper v. White,* 46 N. C., 389; *Ipock v. Gaskins,* 161 N. C., 673; *Penny v. Battle,* 191 N. C., 220; *Bissette v. Strickland, ibid.,* 260; *Craven County v. Parker,* 194 N. C., 561. A controversy as to what lines constitute the boundaries of land involves a question of law; a controversy as to where they are must be settled by the jury under correct instructions based upon competent evidence. *Sherrod v. Battle,* 154 N. C., 345; *Sugg v. Greenville,* 169 N. C., 606.

These principles sustain the ruling of the lower court. The beginning corner and the first three calls, it is admitted, are sufficiently definite; the fourth is along a line to the run of Mingo; and the calls which follow it, while somewhat obscure, are not so indefinite as to preclude identification by parol evidence.

The second assignment of error is addressed to the construction of the Kenion Barefoot deed—the question being whether Moses Barefoot took an absolute estate in fee or whether he and his wife took an estate "during their natural lives and during the life of the survivor." Specifically stated, the question is whether the clause purporting to convey a life estate to these two is void because repugnant to other clauses which purport to convey the fee to Moses Barefoot.

At common law a clause was held to be void if it was repugnant to and irreconcilable with a preceding clause by which an estate was vested in the grantee. Quite a number of our earlier decisions adhered strictly to this doctrine. For example, in the premises of a deed the grantor purported to convey an estate in fee to A., but in habendum to C., and his heirs; it was held that the habendum could not divest an estate already vested by the deed, and that it was void because repugnant to the estate granted in the premises—the premises being all parts of the deed which precede the habendum. *Hafner v. Irwin,* 20 N. C., 570. So in *Snell v. Young,* 25 N. C., 379. There the premises and the habendum which conveyed an estate for life were followed by a warranty of the fee, but it was said that a life estate could not be enlarged into a fee either by a warranty in fee or by a covenant for quiet enjoyment to the grantee and his heirs. The deed under consideration in *Blackwell v. Blackwell,* 124 N. C., 269, purported in the premises, in the habendum, and in the warranty clause to convey the fee to Lelia E. Blackwell, and in the conclusion it purported to convey a life estate to John Blackwell. It was held that the clauses were repugnant and that the last was void. The decision in *Hafner v. Irwin, supra,* was followed in *Wilkins v. Norman,* 139 N. C., 40.

The foregoing cases illustrate the principle as applied at common law; but in *Triplett v. Williams,* 149 N. C., 394, the common-law doctrine was materially modified. In the premises of the deed then before the court, John Greenwood had conveyed the land in controversy "unto the said Margaret Greenwood and her heirs forever," and the premises were followed by the habendum to "Margaret Greenwood during her natural life," etc. The repugnancy of these clauses is as marked as that which appears in *Snell v. Young, supra.* Yet in *Triplett's case* the Court said: "It is true, as contended, that according to the common law, as followed in previous decisions of this Court, the plaintiff acquired a fee simple in the premises of the deed which could not be divested by the habendum. The habendum part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain or qualify the premises, but it was not allowed to divest an estate already vested by the deed, and was held to be void if repugnant to the estate vested by the premises. 2 Black. Com., 298; 4 Kent. Com., 468; *Hafner v. Irwin,* 20 N. C., 570. We concede all that is contended for as to the common-law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested."

This "liberal and enlightened rule of construction" has been approved in an unbroken line of cases from *Acker v. Pridgen,* 158 N. C., 337, in which the Court was asked to overrule its decision in the *Triplett case,* to *Tankersley v. Davis,* 195 N. C., 542, in which *Brogden, J.,* citing *Triplett v. Williams,* said: "The inevitable trend of modern authority is to the effect that a deed must be construed in its entirety in order to ascertain the intention of the parties thereto, and neither 'antiquated technicalities' nor strained construction is permitted to nullify the intention of the grantor."

The primary purpose is to ascertain the intention of the parties. To this end, as was said in *Brown v. Brown,* 168 N. C., 4, we have well-nigh discarded the technical rules of the common law and have enlarged our view and liberalized our methods with the evident purpose of doing justice by revealing the truth and not by concealing it behind ancient and threadbare forms; and where technical rules are not discarded they must generally yield if, in their application, they will disappoint or defeat the expressed intention. *Springs v. Hopkins,* 171 N. C., 486; *Shephard v. Horton,* 188 N. C., 787. In *Davis v. Frazier,* 150 N. C., 451, appears this statement: "It is an undoubted principle that a 'subsequent clause irreconcilable with the former clause and repugnant to the general purpose and intent of the contract will be set aside.' This was expressly held in *Jones v. Casualty Co.,* 140 N. C., 262, and there are many decisions with us to like effect; but as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co., supra;* Lawson on Contracts, secs. 388, 389; Bishop on Contracts, secs. 386, 387." And in *Meroney v. Cherokee Lodge,* 182 N. C., 739: "The modern doctrine, that a deed must be construed as a whole, or by spreading it out before us so that we see it by its four corners, was adopted by us many years ago, one of the earlier cases being *Kea v. Robeson,* 40 N. C., 373, which was later followed by *Gudger v. White,* 141 N. C., 507, where the rule was exhaustively considered and the former cases fully cited. It was there said that we are required by the settled canons of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense."

Whether the deed before us was partly written and partly printed does not appear. *Shephard v. Horton, supra.* But the intention is clearly expressed. The grantor's sole purpose was to convey to Moses Barefoot and his wife nothing more than an estate during their natural lives and to the survivor during his or her natural life. This intention should not be defeated by words used in the first part of the premises and in the habendum which are technically sufficient to convey the fee to Moses Barefoot; for effect can be given the intention by a fair and reasonable construction of the deed. The asserted repugnancy between the conveyance of the title in fee to Moses and the expressed intention to convey it to him and his wife for life is more apparent than real. If it be granted that he holds the legal title it does not follow that his wife has no beneficial interest in the land. He holds the title "to their use and benefit without punishment." It was the purpose of the statute of uses to transfer the use into possession by providing that wherever one person was seized of an estate for the use of another, the *cestui que* use should be deemed to be seized and possessed of the same estate in the land that he had in the use. *Tyndall v. Tyndall,* 186 N. C., 272. The apparent repugnancy can be reconciled by construing the deed as conveying to Moses Barefoot for the use and benefit of himself and his wife an estate during their natural lives and to the survivor during his or her natural life with remainder after the death of the survivor to their children in fee. The objection that this construction requires the transposition of words is without merit. By one of the recognized canons of interpretation such transposition is not only permissible but is frequently necessary. In *Parkhurst v. Smith,* Willes Rep., 332, *Lord Chief Justice Willes* observed "that too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect, for the law is not wise in grants, and therefore it doth often *transpose* words, contrary to their order, to bring them to the intent of the parties." Approved in *Bunn v. Wells,* 94 N. C., 67, this principle has been applied also in many other cases, among them *Phillips v. Davis,* 69 N. C., 117; *Phillips v. Thompson,* 73 N. C., 543; *Allen v. Bowen,* 74 N. C., 155; *Hicks v. Bullock,* 96 N. C., 164; *Smith v. Proctor,* 139 N. C., 314; *Real Estate Co. v. Bland,* 152 N. C., 225. This construction excludes the application of the principle stated in *Redding v. Vogt,* 140 N. C., 562, and gives effect to the plain intention of the parties.

The appellants contend that the words "then the said land *or any part thereof* is intended to belong in fee simple to the children" gave to Moses Barefoot and his wife the right of alienation, and cite *Herring v. Williams,* 153 N. C., 231, as authority for this position; but upon a rehearing the decision on this point was reversed. *S. c.,* 158 N. C., 1. See, also, *Miller v. Scott,* 184 N. C., 556; *Burwell v. Bank,* 186 N. C., 117; *White v. White,* 189 N. C., 236; *Roane v. Robinson, ibid.,* 628.

In reference to the third assignment of error the appellee says in her brief that the question of improvements was not presented for decision at the hearing, but was first raised in the answer which was filed only a few days before the appeal was perfected, and that the expediency of a sale was not contested. Whether a sale will best subserve the interest of the parties is a question of fact for the trial judge; and the right to insist upon compensation for improvements is not necessarily foreclosed by the judgment. *Pritchard v. Williams,* 181 N. C., 46.

The judgment of the Superior Court is
Affirmed.

MARVIN WADE AND THE GENERAL UTILITY COMPANY v. RALPH LUTTERLOH.

(Filed 3 October, 1928.)

1. **Appeal and Error—Review—Findings of Fact.**

   When the findings of fact by the referee are supported by any competent evidence, and are approved by the trial judge, they are not reviewable on appeal.

2. **Contracts—Actions for Breach—Necessity of Performance, Tender or Readiness to Perform.**

   A purchaser of capital stock of a corporation upon the condition that he would take a certain proportionate amount of a fixed total, the seller the same number of shares, and that a disinterested third person would take the remaining two shares, the corporation thus to consist of the three persons, the transaction to be closed at a fixed date, the purchaser to give in payment his notes secured by a mortgage on his real estate upon terms to be agreed upon: *Held,* the seller in making demand upon him to take the shares must do so according to the terms of the agreement, within the time specified, and when he has not done so, he may not recover damages for the failure of the purchaser to purchase the stock.

3. **Same.**

   A party to a contract to enforce it must prove performance of his antecedent obligations arising thereunder or some legal excuse for nonperformance, and if the stipulations are concurrent, his readiness and ability to perform them.

4. **Contracts—Construction and Operation of Conditions.**

   The rule that covenants in a contract are ordinarily regarded as concurrent is one of interpretation and not of substantive law, and gives way to the intent of the parties as gathered from the construction of the whole instrument as to whether a condition is precedent, concurrent, or subsequent.

5. **Contracts—Requisites and Validity—Nature and Essentials in General.**

A contract to enter into a future contract must specify all of its material and essential terms, and leave none to be agreed upon as a result of future negotiations.

6. **Contracts—Construction and Operation of Conditions.**

Where the contract leaves indefinite the performance of one of the covenants of a party, the law implies a reasonable time under the surrounding facts and circumstances.

APPEAL by plaintiff, Marvin Wade, from *Nunn, J.*, at April Term, 1928, of HARNETT. Affirmed.

This is a civil action instituted by Marvin Wade and the General Utility Company, a corporation, against the defendant to recover damages, alleged to be due on account of breach of contract. At November Term, 1926, the General Utility Company took a voluntary nonsuit and the action as between Marvin Wade, as plaintiff, and Ralph Lutterloh, as defendant, was referred by consent to Norman C. Shepard, Esq., referee. Marvin Wade's cause of action is bottomed on a written contract made between himself and defendant on 5 December, 1924.

The contract in substance—Marvin Wade agrees and binds himself to secure and deliver to Ralph Lutterloh 249 shares of the par value of $100 of the capital stock of the General Utility Company, a corporation, with capital stock of $50,000 upon the payment to him by Ralph Lutterloh of the sum of $27,500; $22,500 of that sum to be paid into the treasury of the General Utility Company to be used in the business of the company. Ralph Lutterloh agrees to take and pay for said 249 shares of said stock according to the terms above outlined, and that upon the delivery of the stock to him that "he will execute his note in the sum of $27,500, due and payable at such time as shall be agreed upon and shall secure the same in a manner satisfactory to the said Marvin Wade, it being agreed that he will secure same with mortgages on said real estate located in the city of Fayetteville.

It is understood and agreed by the parties hereto that the transactions and arrangements herein provided for shall be fully closed up and the note and security shall be executed and given by said Ralph Lutterloh and the capital stock shall be delivered to him by said Marvin Wade on or before 25 December, 1924.

The capital stock of the said General Utility Company is at present $45,000, but it is the understanding and agreement that said capital stock is to be increased to $50,000, and Ralph Lutterloh is to hold 249 shares, Marvin Wade is to hold 249 shares, and two shares is to be held by some third person to be agreed upon by the said Ralph Lutterloh and Marvin Wade."

The referee found the following facts:

"3. That at the time of the execution of the said contract the capital stock of the General Utility Company consisted of 450 shares with a par value of $100, held as follows:

Marvin Wade, plaintiff	150 shares.
B. O. Townsend	150 shares.
G. M. Tilghman	150 shares.

4. That after the execution of said contract and some time prior to 25 December, 1924, the plaintiff, Marvin Wade, purchased from B. O. Townsend the 150 shares held by him at $36 per share, for $5,400.

5. That shortly thereafter, and prior to 25 December, 1924, the plaintiff notified the defendant that he had the stock and was ready to deliver it to him, at which time the plaintiff held 300 shares of the capital stock of the company.

6. That the defendant at that time informed the plaintiff that his estate had not been settled and that he did not have the money.

7. That there was no further conversation or dealing between the plaintiff and the defendant with respect to the performance of said contract until some time in January or February, 1925, a month or more after the date of performance provided in the contract.

8. That the plaintiff made no tender to the defendant in compliance with his part of the contract and made no demand upon the defendant that he execute a note for the purchase of the stock as provided in the contract.

9. That the outstanding indebtedness of the General Utility Company, at the time of the execution of the contract, and the purchase of the 150 additional shares of stock by plaintiff from B. O. Townsend, in the way of guaranteed preferred stock was $20,000, and is now $12,500."

The referee's conclusions of law:

"(c) That the plaintiff is not entitled to recover for breach of the contract from the foregoing findings, having failed to tender the stock and demand the execution of note secured by mortgage on or before 25 December, as provided in said contract.

(d) That the mere failure of the defendant to comply with the provisions of the contract does not warrant a recovery by the plaintiff.

(e) That even though the plaintiff were entitled otherwise to recover from the defendant, there is no evidence from which the referee can find plaintiff's damages.

Wherefore, your referee recommends that the plaintiff recover nothing of the defendant in this action and that the defendant recover its costs as taxed by the clerk."

The plaintiff filed certain exceptions to the referee's report. They are set forth in the hearing in the court below as follows: "His Honor declined to sustain plaintiff's first exception to the report of the referee as follows: 'The plaintiff excepts to finding of fact No. 8, in that the same is inconsistent with findings of fact Nos. 5 and 6, and in that the same is a legal inference and should be excluded as a finding of fact.' "

That his Honor was requested as set forth in plaintiff's second exception to the report of the referee to find as a fact "that in addition to the facts set forth in finding of fact No. 7, the court should have found as a fact that the defendant in January or February, 1925, advised the plaintiff that he was not satisfied with his contract and that he wanted to be relieved from it on account of his wife's unwillingness to live in the town of Dunn."

His Honor declined to sustain plaintiff's third exception to the referee's report and to conclude as a matter of law "that the plaintiff is entitled to recover for breach of contract from the findings of fact, the plaintiff having tendered the stock demanded by the contract and having demanded compliance on the part of the defendant with said contract prior to 25 December, 1925, or that the defendant thereupon waived such tender."

That the court erred in not sustaining the plaintiff's fourth exception to the referee's report and concluding as a matter of law "that the defendant under the circumstances and facts found was liable to the plaintiff in damages on account of the breach of the contract."

The court below rendered the following judgment: "It is adjudged and ordered that said report be, and it is hereby, approved and confirmed, except that it is modified by the additional conclusion of law:

(f) That plaintiff is not entitled to recover damages of the defendant.

Judgment is hereby rendered accordingly, and it is adjudged that plaintiff take nothing, and that defendant go without day and recover his cost of plaintiff, to be taxed by the clerk."

The plaintiff duly excepted and assigned errors to the court below declining to sustain plaintiffs' numerous exceptions and the judgment rendered, and appealed to the Supreme Court.

The plaintiff, Marvin Wade's, testimony was the sole evidence before the referee.

J. C. Clifford for plaintiff.
Dye & Clark for defendant.

CLARKSON, J. "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N. C., 60." *Kenney v. Hotel Co.,* 194 N. C., at p. 45.

"While the courts now assume that covenants are dependent rather than independent, and concurrent on the one hand rather than precedent and subsequent on the other, this rule, like the other rules of modern law on this subject, is merely a guide to aid the court in ascertaining the intention of the parties; and it is not a rigid rule of substantive law. Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties." Page on The Law of Contracts, Vol. 5 (2 ed.), sec. 2948. *Statesville Flour Mills Co. v. Wayne Distributing Co.,* 171 N. C., 708. *Smith v. Smith,* 190 N. C., 764. See *N. C. Highway Commission v. Rand,* 195 N. C., 799.

"While a contract is still executory on both sides, the renunciation of it by one of the parties thereto before the time for performance has arrived, has or may have, important legal consequences. What these consequences are is a question upon some branches of which the courts are practically unanimous; while upon other branches they are by no means as unanimous as the outward form of some of the statements of the law would lead us to believe.

"Renunciation by one party excuses the other from any further offer to perform, so that the failure of such other party to perform or to tender performance does not give to the party who was originally in default the right to treat the contract as discharged because of such nonperformance; and such failure does not show that the party who was originally not in default and who has omitted to perform further, or to tender performance, has consented to treat such contract as discharged so as to prevent him from enforcing it thereafter, at least by an action for damages or some similar appropriate remedy." Page on The Law of Contracts, Vol. 5, sec. 2882.

Gaylord v. McCoy, 161 N. C., 685; *Headman v. Commissioners,* 177 N. C., 261; *Rogers v. Piland,* 178 N. C., 70; *Cunningham v. Long,* 186 N. C., 526; *Samonds v. Cloninger,* 189 N. C., 610; *Bryant v. Lumber Co.,* 192 N. C., 607.

"A contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as a result of future negotiations." Elliott on Contracts, part sec. 175. *Edmonson v. Fort,* 75 N. C., 404; *Elks v. Ins. Co.,* 159 N. C., 627.

In *Edgerton v. Taylor,* 184 N. C., at p. 578 it is said:

"One party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them. *Ducker v. Cochrane,* 92 N. C., 597, cited and approved in *McCurry v. Purgason,* 170 N. C., 468; *Tussey v. Owen,* 139 N. C., 457"; *Colt v. Kimball,* 190 N. C., at p. 174; *Bryant v. Lumber Co.,* 192 N. C., 607; *Seed Co. v. Jennette Bros.,* 195 N. C., 173.

We give the general principles of law bearing on the facts in the present action. Let us analyze the contract as a whole—several material matters were left open: (1) No time is specified for the payment by defendant of the $27,500 note. What is a reasonable time? See *Colt v. Kimball,* 190 N. C., at p. 174. The security is indefinite and uncertain. (2) *The person* who was to hold the two shares of stock would hold the balance of power between the plaintiff and defendant. His vote would be sufficient to carry or defeat any proposition. The three are to compose all the stockholders. (3) The agreement was to sell 249 shares of stock with capital stock of $50,000, whereas the stock actually issued was $45,000, and the agreement was to increase it to $50,000.

The *transactions and arrangements* set forth in the contract *"shall be fully closed up"* . . . *"on or before 25 December, 1924."* At the time plaintiff notified defendant, which was before 25 December, 1924, that he had the 249 shares of stock and was ready to deliver it to him, other essential matters were in *fieri*—incomplete. Plaintiff at the time had only 300 shares. If defendant had taken same when tendered plaintiff would have had only one share. The G. M. Tilghman share, plaintiff testified, was available and "could have gotten the 150 shares from Mr. Tilghman any time I called for it by relieving him of his endorsement for the General Utility Company." On 25 December the endorsement amounted to about $20,000. This had to be paid by plaintiff. The contract with defendant was to make a note for the $27,500, with security—$22,500 of that uncertain security had to be realized on and used in the business of the company. Construing the contract as a whole—considering its purpose, the method of control of the stock between the parties—the essential matters in *fieri*—we cannot hold that plaintiff was ready and able to perform his part of the contract. We do not think there is any evidence of renunciation on the part of defendant before the time limit for the performance of contract had arrived.

Taking in consideration the entire contract, its incompleteness in certain particulars, how the corporation should be controlled, the nature and purpose of the contract, we see no error in the judgment of the court below. We think under the facts and circumstances of the case there was sufficient evidence to support the findings of fact. There is no error in law. The judgment of the court below is

Affirmed.

P. G. MAULDEN v. HIGH POINT CHAIR COMPANY.

(Filed 3 October, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Assumption of Risk.**

   The doctrine of assumption of risk will not ordinarily preclude a recovery by an employee for an injury caused by the employer's negligence unless the danger is so open, obvious and imminent that no man of ordinary prudence would continue in the employment and incur the risk thereof.

2. **Same—Questions of Law—Questions of Fact.**

   Where there is any doubt as to the facts or the inferences to be drawn therefrom, the question of whether the risk incurred in the employment is so openly, obviously and imminently dangerous as to put into operation the doctrine of assumption of risk, is for the jury, and it is only where there is a clear case that it is one of law for the court.

3. **Same—Burden of Proof.**

   The burden of proof as to the assumption of risk is upon the defendant.

CIVIL ACTION for damages, tried before *Nunn, J.*, at July Term, 1928, of CHATHAM.

The evidence tended to show that the plaintiff was an experienced workman, having worked for the defendant about seven years, and on the date of his injury was running four boring machines. On said date the foreman gave the plaintiff a punch and directed him to lace the belt on one of the machines and start it up. In order to start up the machine it was necessary to put on the belting.

Plaintiff's narrative of his injury was as follows: "I laced the belt and got through with it and went to put it on. I had to put it on with a stick. I had to go up on the ladder and reach over just as far as I could reach to pull the belt on the pulley. After it had been laced it was tight. The first time it didn't go on, but the second time it went on just like that—snapped on like lightning—and when it did it threw me, and there was no way for me to help. . . . I was standing on top of the ladder. . . . I used the stick because that was the only thing we had to use to pull the belt on with. That was what we had been using. Mr. Brooks (foreman) told me to use it. . . . The company did not furnish anything to use except the stick. There was no lever furnished for shifting the belt. . . . He (foreman) told me to get a stick and step-ladder and put this belt on. He told me to go up the ladder and put the belt on with the stick. . . . I have put belts on that way before many times. All the other times I put the belts on like I did this time; just exactly the same way. . . . The step-ladder was shackly; it was shackly all over. I do not know how long it had been in that condition, but it had been that way for a good while. I had discovered that; I had used it several times before to put on the belt and placed the ladder up under the shafting; take a chair round to get to the top of the ladder and some one else would take my stick and pull the belt on the pulley of the machine. No one would tell me how to do it. They knew that I knew how to do it. I knew how to put the belt on that pulley; Brooks (foreman) had told me how. . . . I had to lean way over to get it; the belt and ladder together threw me off. I know that all machinery is naturally dangerous; this machinery was not any more dangerous than any other machinery used in places like this, though I do not know that they have machines where they have a clutch to stop the shafting so as to put on the belt, but this machinery is not any more dangerous than other machinery. I complained to Mr. Brooks (foreman) about it. I told him that putting these belts on like they had to be put on was dangerous. He said well, he could not help it."

A witness for plaintiff testified that he knew such appliances as were used in modern furniture factories for shifting belts on running pulleys. Witness said: "Most of the machines I have ever operated have levers for shifting belts. . . . These appliances are in general use in all plants I have worked in."

Issues of negligence, contributory negligence, assumption of risk and damages were submitted and answered by the jury in favor of the plaintiff. The verdict awarded damages in the sum of $4,750. From judgment upon the verdict the defendant appealed.

Long & Bell, McLendon & Hedrick and L. A. Wilson for plaintiff.
Siler & Barber and Murray Allen for defendant.

BROGDEN, J. The chief question of law presented is this: Under what circumstances will the doctrine of assumption of risk bar recovery in personal injury actions?

The evidence discloses that the plaintiff was an experienced employee and was fully aware of the fact that the method of putting on belting, adopted by the defendant, was attended with danger. The law imposes upon an employer of labor the positive duty to use ordinary care in providing employees with reasonably safe methods and means to do the work for which they are employed. *Jefferson v. Raleigh,* 194 N. C., 479, 140 S. E., 76. There was sufficient evidence of the failure of defendant to perform this duty, but the defendant contends that by reason of the fact that the plaintiff appreciated the danger and continued to work in his employment in the face of a known danger, that the doctrine of assumption of risk precludes him from recovering damages arising from the negligence of the employer in adopting and in continuing to operate the machinery by negligent methods. "Assumption of risk is a matter of defense analogous to contributory negligence to be passed on by the jury, who are to say whether the employee voluntarily assumed the risk. It is not enough to show merely that he worked on knowing the danger, but further, it is only where the machinery is so grossly and clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk." *Lloyd v. Hanes,* 126 N. C., 359, 35 S. E., 611. *Hoke, J.,* writing in *Hicks v. Mfg. Co.,* 138 N. C., 319, 50 S. E., 703, quoted with approval the following excerpt from *Patterson v. Pittsburgh,* 76 Pa. St., 389: "When the servant, in obedience to the master incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury or it is reasonably probable may be used safely by extraordinary caution, the master is liable for the resulting injury." The learned *Justice,* commenting upon the rule announced, says: "In several of the recent decisions, the standard in such cases is said to be that these risks are never assumed unless the act itself is obviously so dangerous that the inherent probabilities of danger are greater than those of safety."

Again in *Bissell v. Lumber Co.,* 152 N. C., 123, 67 S. E., 259, the Court adopted the rule as stated in Shearman and Redfield on Negligence, section 211, as follows: "The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the same work under the same risk." *Pressly v. Yarn Mills,* 138 N. C., 410, 51 S. E., 69; *Russ v. Harper,* 156 N. C., 444, 72 S. E., 570; *Hamilton v. Lumber Co.,* 156 N. C., 520; 72 S. E., 588; *Howard v. Wright,* 173 N. C., 339, 91 S. E., 1032; *Medford v. Spinning Co.,* 188 N. C., 125, 123 S. E., 257; *Parker v. Mfg. Co.,* 189 N. C., 275, 126 S. E., 619; *Robinson v. Ivey,* 193 N. C., 805, 138 S. E., 173.

Our decisions are to the effect that mere knowledge of danger, ordinarily, does not preclude recovery unless the danger is so open, obvious and imminent that no man of ordinary prudence would continue to incur the risk thereof. If the danger is so open, obvious and imminent that no man of ordinary prudence would incur the risk thereof, then under such circumstances a workman who continues in the employment would be guilty of such contributory negligence as to bar a recovery. *Russ v. Harper,* 156 N. C., 444. That is to say the assumption of risk is not in itself a negligent act by the workman unless the danger is open, obvious and imminent to the extent "that the inherent probabilities of danger are greater than those of safety." If such condition exists, then the act of the workman in continuing the employment in the face of such danger becomes itself contributory negligence, which bars recovery.

But who is to decide the question as to whether the danger is so open, obvious and imminent that no man of ordinary prudence would continue in the employment? This question has been answered by this Court in *Medford v. Spinning Co., supra. Adams, J.,* said: "Whether the danger of putting the belt in the pulley when the machinery was in motion was so obvious that a man of ordinary prudence would not have gone on with the work, was a question for the jury to determine upon all the evidence." *Parker v. Mfg. Co.,* 189 N. C., 275, 126 S. E., 619. However, it has been held, in proper cases, that contributory negligence under certain circumstances will bar recovery as a matter of law. This is illustrated by the case of *Mathis v. Mfg. Co.,* 140 N. C., 530, 53 S. E., 349, and *Jackson v. Mfg. Co.,* 195 N. C., 18. In both of these cases it appears that no negligent method of doing the work was involved and serious injury from inattention was obvious, imminent and certain. The rule is expressed thus: "In a clear case the question of assumption of risk by the employee is one of law for the court, but where there is doubt as to the facts or as to the inferences to be drawn from them, it becomes a question for the jury. To preclude a recovery on that ground, it must appear that the employee knew and appreciated, or should have known and appreciated, the danger to which he was exposed, and in case of doubt that is for the jury. . . . The burden of proof as to the assumption of risk is upon the defendant; and where there is any doubt as to the facts, or inferences to be drawn from them, the question is for the jury." *Cobia v. R. R.,* 188 N. C., 487, 125 S. E., 18.

Therefore, we are of the opinion that the trial judge ruled correctly in submitting the issues to the jury, and the verdict of the jury has determined the merits of the controversy.

No error.

JOHN MOORE v. JOHN W. RAWLS ET AL.

(Filed 3 October, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Third Persons—Work of Independent Contractors.**

Where the principal contractor for the loading of logs on cars of a lumber company furnishes a skidder for this use to an independent contractor who has full charge of the employees for the work, and they are solely employed by him under the terms of the independent contractor, and in fact, while the principal contractor may be held liable to one of these employees for furnishing a defective skidder which causes an injury, it is not responsible for such injury when the injury is solely caused by the negligence of the independent contractor in operating the skidder, and there is no evidence or claim that the skidder in use was defective.

2. **Master and Servant—Liability of Master for Injuries to Servant—Tools, Machinery, and Appliances—Logging Roads.**

Where the employee of an independent contractor is injured while engaged in loading logs upon the cars of a lumber road, the fact that the cars furnished by the lumber company were not furnished with automatic couplers is not evidence of any negligence; companies of such character being required to furnish cars with such ordinary couplings as are approved and in general use for the work being done.

CIVIL ACTION, before *Harris, J.*, at February Term, 1928, of CRAVEN.

The plaintiff instituted an action against John W. Rawls and Goldsboro Lumber Company, and Dover & Southbound Railroad Company for personal injury sustained on or about 27 May, 1925.

The evidence tended to show that the defendant Rawls entered into a contract with his codefendant, Goldsboro Lumber Company, according to the terms of which Rawls was to cut and haul the timber out of the woods and load it on cars for so much per thousand feet "for logs loaded on cars." In order to load the timber the Goldsboro Lumber Company furnished to Rawls a skidder or loading machine. Rawls had charge of the skidder and operated it according to his own methods. The Goldsboro Lumber Company had nothing to do with the operation of the skidder or any control thereof after it was furnished to Rawls, but had exclusive control of the cars and appliances for removing the timber after it was loaded. The plaintiff was employed by Rawls as a laborer, and at the time of his injury had been in such employment for about seven months. On the day of his injury the log train of the defendant, Goldsboro Lumber Company, was backing up to the skidder to be loaded. The skidder, according to plaintiff's testimony, was jacked up on one side, but on the other side it had not been jacked up high enough to permit a log car to get under it.

Plaintiff's narrative of his injury is as follows: "Captain Clyde Fornes (foreman of Rawls) was running the skidder machine and he called me to couple the car. . . . I went to couple the cars where the skidder machine sat on and when I missed the coupling the other car got me. I could not couple the cars when getting in between them the way they had them. I had to couple the link so it would go in and then push the pin in. It was a hand coupler with a link and pin. It was not a self-coupler or automatic coupler. At the time I missed the coupling, one of the cars was still and the other one coming down on me. The machine which was jacked up was sitting still, . . . and when I went to put the pin in to catch it the car caught me. . . . The cars did not move any. When I missed the coupling, the bolster of the car caught me and jammed me under the cars, under the skidder. . . . I was hired to do anything and did anything the boss told me to do. . . . These cars were little small cars such as ordinarily used in the logging woods in this country, and just like all logging companies use. . . . I have seen log cars that had automatic couplers. The Roper Lumber Company has automatic couplers."

At the conclusion of the evidence the trial judge sustained the motion of nonsuit made by Dover & Southbound Railroad Company.

The issues and the answers of the jury thereto were as follows:

1. Was the plaintiff in the employ of the defendant, J. W. Rawls, as alleged in the answer? Answer: Yes.
2. Was the plaintiff in the employ of the defendant, Goldsboro Lumber Company, at the time of his injury? Answer: Yes.
3. Was the defendant, J. W. Rawls, independent contractor as alleged in the complaint? Answer: Yes.
4. Was the plaintiff injured by the negligence of the defendant, J. W. Rawls, as alleged in the complaint? Answer: No.
5. Was the plaintiff injured by the negligence of the defendant, Goldsboro Lumber Company, as alleged in the complaint? Answer: Yes.
6. Did the plaintiff by his own negligence, contribute to his injury? Answer: No.
7. What damage, if any, is plaintiff entitled to recover? Answer: $500.00.

From judgment upon the verdict the defendant, Goldsboro Lumber Company, appealed.

D. L. Ward and Ward & Ward for plaintiff.
T. D. Warren for defendant.

BROGDEN, J. Is it the duty of logging roads or tramroads to equip log cars and engines with automatic couplers?

The defendant, Rawls, was an independent contractor, and as such employed the plaintiff as a laborer. Under the contract existing between the independent contractor and the defendant, Goldsboro Lumber Company, it was the duty of the contractor to cut and load logs on the cars of his codefendant. There is no evidence tending to show that the defendant, Goldsboro Lumber Company, had charge or supervision of the employees of the contractor or of the method of performing the work. It did, however, furnish the skidding machine. It was therefore the duty of the Lumber Company to furnish to its contractor machinery, implements and appliances safe and suitable for the work to be performed and to keep such appliances in safe condition so far as this could be done by the exercise of proper care and supervision. The Lumber Company owed this duty to the plaintiff even though he was an employee of the contractor because failure to furnish such appliances as the law contemplates resulted in making the contractor and his employees the employees of the Lumber Company in this particular. *Paderick v. Lumber Co.,* 190 N. C., 308, 130 S. E., 29. The plaintiff relies upon the *Paderick case,* but it must be observed that this case involved a defective loading machine. The case at bar, on the other hand, discloses no defect whatever in the skidder, but at most a negligent method of operating it in that it was not jacked up high enough. This involved the operation of the skidder only, and the Lumber Company had nothing to do with such operation.

The evidence disclosed no defect in the cars or couplings, but the plaintiff takes the position that it was the duty of the Lumber Company to furnish cars with automatic couplers and that a failure to do so was equivalent to furnishing him defective appliances. In this State logging roads have been required: (1) to keep its right of way clear of trash and other inflammable substances, *Craft v. Timber Co.,* 132 N. C., 151, 43 S. E., 597; (2) to equip engines with spark arresters, *Cheek v. Lumber Co.,* 134 N. C., 225, 46 S. E., 488, 47 S. E., 400; (3) to keep a proper lookout, *Sawyer v. R. R.,* 145 N. C., 24, 59 S. E., 116; (4) to keep its right of way and roadbed in proper condition and repair, *Hemphill v. Lumber Co.,* 141 N. C., 487, 54 S. E., 420; *Buchanan v. Lumber Co.,* 168 N. C., 40, 84 S. E., 50; (5) to provide in the exercise of due care reasonably safe couplers. *Liles v. Lumber Co.,* 142 N. C., 39, 54 S. E., 795. But it has never been held in this State that it is the duty of logging roads to equip their engines and cars with automatic couplers. C. S., 3465, has been held to apply to logging roads, and under the construction of this statute assumption of risk is not available. *Williams v. Mfg. Co.,* 175 N. C., 226, 95 S. E., 366; *Bissell v. Lumber Co.,* 152 N. C., 123, 67 S. E., 259. The case of *Williams v. Mfg. Co.,* 175 N. C., 226, 95 S. E., 366, held that it was error for the trial judge to apply the principle of comparative negligence to logging roads. However, since that decision C. S., 3470, has been enacted by the Legislature. In the case of *Hines v. Lumber Co.,* 174 N. C., 294, 93 S. E., 833, the Court, distinguishing the *Greenlee* and *Troxler cases,* 122 N. C., 977, 30 S. E., 115; 124 N. C., 189, 32 S. E., 550, said: "Here, as in other ordinary cases, the defendant is required to supply for its employees "implements and appliances which are known, approved and in general use," and there is testimony on the part of plaintiff tending to establish negligent default in this respect; but neither the car nor the defects suggested present such exceptional or extraordinary conditions as to withdraw the case from the usual and recognized principles in actions of this character and which make contributory negligence on the part of the employee a valid defense." The decision, however, in the *Hines case* was rendered prior to the adoption of C. S., 3470. The later decisions hold that contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. *McKinish v. Lumber Co.*, 191 N. C., 836, 133 S. E., 163; *Stewart v. Lumber Co.*, 193 N. C., 138, 136 S. E., 385; *Lilley v. Cooperage Co.*, 194 N. C., 250, 139 S. E., 369. It is clear, therefore, that in the development of the law with respect to the liability of logging roads, this Court has not yet taken the position that logging roads should be required to install and maintain automatic couplers.

There is no evidence upon the present record tending to show that the link and the pin coupling used by the defendant was not an approved appliance and in general use. The plaintiff was not an employee of the defendant Lumber Company and was not directed by any of its employees to couple the cars. Neither is there evidence of any defect in the cars or coupling. There was no evidence of any unusual or negligent movement of the train or that the employees of the Lumber Company had notice that the plaintiff was undertaking to couple the cars.

Under these circumstances we are of the opinion that the defendant Lumber Company was not guilty of negligence, and the motion for nonsuit as to it should have been allowed.

Error.

STATE v. NELLIE AND ROBERT CARR.

(Filed 10 October, 1928.)

1. **Evidence—Expert Testimony—Subjects of Expert Testimony.**

In an action for homicide wherein the issue is dependent upon whether the deceased committed suicide or the defendants killed him, medical expert testimony that the deceased could not have killed himself with the gun is incompetent, the conclusion being in effect an answer to the only issue submitted to the jury, and being within the knowledge of an ordinary man, and one that the jury should have reached themselves in answering the issue submitted as to the defendant's guilt or innocence of the offense.

2. **Criminal Law—Evidence—Weight and Sufficiency.**

A defendant may not be convicted as an accomplice or fellow conspirator of another in committing a homicide, upon evidence that does not amount to more than a speculation or conjecture.

3. Criminal Law—Appeal and Error—Review—New Trial.

Where material evidence admitted on the trial of a homicide should have been excluded, a new trial will be granted in the Supreme Court on appeal.

4. Criminal Law—Evidence—Weight and Sufficiency.

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. C. S., 4643.

APPEAL by defendants from *Grady, J.*, at July Term, 1928, of DUPLIN.

Nellie Carr, Robert Carr, James Carr, Graham Carr, and Willie Carr were indicted for the murder of Will Carr, the husband of Nellie and the father of the other defendants, on the night of 8 October, 1927. At the close of the State's evidence James Carr was discharged, and on the trial Nellie and Robert were convicted of manslaughter, and the others were acquitted. From the judgment pronounced Nellie and Robert appealed upon error assigned.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George R. Ward and Rivers D. Johnson for appellants.

ADAMS, J. The evidence tends to show the following circumstances: The deceased and his family lived on the second floor of a house used for packing tobacco. The room was about twenty-four steps long, and had one door opening from a porch on the front which was reached by a stairway. Near the middle of the room was a curtain intended as a partition, the space occupied by the deceased and his wife being on the north side and on the south the space occupied by the children. There was a window in the rear of the room. The bed on which Robert and his wife slept was between the door and the curtain. The other children were sleeping on the porch when their father came to his death. The bed occupied by the deceased was in the northeast corner of the room. His death occurred a little while before midnight.

Nellie Carr testified that she was forty-three years of age, had been married twenty-six years, had lived peaceably with her husband; that he had recently begun to drink and to "take dope," and on the afternoon preceding his death had come home intoxicated. In reference to his death she said: "On the same night, and before he shot himself, he was lying on the bed and I was sitting on the trunk. He raised up, and his pants were hanging on the wall of the house, and he took his pistol out of his pants pocket and turned to the wall and shoots that way five times.

I was on the trunk and I said, 'Willie, what in the world do you mean shooting this time of night? The folks won't know what to think of you.' He never said a word to me. After a while Graham came in. He had been to church, and he went to sleep out on the porch. Willie Henry, my boy, and Marie, my girl, were sleeping on the porch that night because it was so hot. Robert and his wife came home on the truck, just before Will shot himself. After he shot in the wall, he laid back on the bed, and after a while I heard the truck coming, and Will called to me to bring him some matches. He had cover (quilt) around him, and he said 'Get me the matches,' and I handed him the matches and he said, 'I don't want that,' and I said, 'The boys say they won't strike without the box.' He took the matches and said to me: 'I am going to burn up these things.' I said, 'Don't you know if you burn up these things you will burn up yourself, and us and what is below you?' And I turned off and the gun fired. The load hit him in the right temple, and I looked him over and commenced to holler, and Willie Henry and Robert ran to me, and I told them to go get Mr. Gaylor (who is the magistrate at Magnolia) and Mr. Potter (our neighbor) and somebody there. . . . I didn't know where the gun was when I was talking with him about burning the things up. He was sitting on the bed, towards the foot, on the edge of the bed, and he fell right back over. He was on the bed when I grabbed him. When the gun fired I looked. The gun fell on the floor. I didn't look for any gun—didn't know he had one there. I was right at him, but didn't see the gun; he must have had it under the cover. I didn't see the gun. I knew he had the pistol in the bed. He was shooting with that before he killed himself. He was lying flat down when he was shooting with the pistol."

Dr. Quinn, a witness for the State, testified as follows: "I examined the body of Will Carr and found him on the bed as has been described, lying cross-wise with the right side of his head towards the front of the house, on his back. I probed the wound, which was about two inches above his right eye, and the load went in downward. I found the wound in the head, one shot in the collar bone and around his neck and face. There were no powder stains that I could tell. I did not get any of the shot or discover any other wound on his body. From my examination the wound was made with a shot gun No. 6 shot." "Q. From the position the body was lying in, from your examination of it, have you an opinion as to whether that wound could have been made by a gun in the hands of this deceased or not? A. I don't think it is possible for the deceased to have fired the gun and made the wound that I saw." The defendants excepted to the question and the answer. This evidence should have been excluded. The defense was suicide. The ultimate issue for the jury was whether in truth the deceased had fired the gun; but notwithstanding positive evidence to the contrary, the witness was permitted to make an unqualified negative answer. As a rule the witness is required to state the facts he observed and relied on as the basis of his opinion so far as they permit of a detailed enumeration. Such a statement of the facts affords an opportunity of testing the reasonableness of his inference, for a witness may not express an opinion which finds no support in the facts he enumerates. Here the question called for an answer not necessarily involving a matter of science and not based upon an enumeration of circumstances into the truth of which it was the province of the jury to inquire. The objection to disregarding this rule is that for their own inference from the facts the jury may substitute that of the witness. 22 C. J., 551.

In the next place the answer invades the province of the jury. For the reason that it is difficult to explain a combination of facts in such a way as to enable the jury to deduce a logical conclusion, it often happens that the testimony of a witness is essentially an expression of opinion. But the exception to the general rule which excludes opinion evidence is subject to the limitation that the opinion or inference of the witness must not be an answer to the exact issue which the jury is to determine. When the witness testified that he did not think it possible for the deceased to have fired the gun and to have made the wound he necessarily testified in effect that in his opinion the deceased did not kill himself. True, the "exact issue" was whether the defendants are guilty, but if the deceased killed himself the conclusion that the defendants did not kill him would necessarily follow. *Summerlin v. R. R.,* 133 N. C., 551, 555; *Lynch v. Mfg. Co.,* 167 N. C., 98; *Gray v. R. R., ibid.,* 433; *Kerner v. R. R.,* 170 N. C., 94; *Marshall v. Telephone Co.,* 181 N. C., 292; *Stanley v. Lumber Co.,* 184 N. C., 302. The exact question arose in *S. v. McCravy,* 181 S. E. (Tenn.), 165, in which George W. McCravy and another were prosecuted for an assault upon Mrs. McCravy with intent to commit murder in the first degree. A part of the main testimony relied on for conviction was that of Doctor Myers, an expert witness, who said that Mrs. McCravy could not herself have inflicted the wound in her head or in her left arm. In reviewing an exception to this testimony the Court said: "We are of opinion that it was error to permit him to give his opinion as an expert, or to state as he did, in substance, positively that the bullet could not have been shot by Mrs. McCravy in the manner in which she was shot. Testimony is permissible allowing an expert to state a conclusion or give an opinion on a subject which is peculiarly a matter of superior knowledge on his part, for the reason that the lay mind is not so competent to form an opinion or reach a conclusion. Such expert opinion or conclusion, however, may be permitted only in matters peculiarly within the knowledge of an expert. The question whether a delicate woman can reach around with the right hand and shoot herself in the left side of the head, or whether she can do so at the same time shooting herself through the left arm, is not peculiarly a matter of expert learning upon the part of a physician. This is a conclusion which the ordinary, practical mind may reach, as well as the trained physician, and can be more readily reached by one trained in the use of firearms. Whether Mrs. McCravy shot herself was the ultimate fact to be reached by the jury, because if she shot herself it necessarily follows that both defendants were innocent. To permit the doctor to say whether it was possible for her to do this, when the jury could as well reach the same conclusion, was an invasion of their province. *Telephone and Telegraph Co. v. Mill Co.,* 129 Tenn., 374, 381, 382, 164 S. W., 1145."

The evidence is not sufficient to sustain a verdict against Robert Carr, nothing appearing beyond speculation or conjecture on which to base an inference of conspiracy or concert of action between him and his mother, and as to him the demurrer to the evidence should have been sustained. C. S., 4643. With Dr. Quinn's answer to the question excluded, is there any evidence against Nellie, the widow of the deceased?

In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and of all inferences that may fairly be drawn from them. *S. v. Carlson,* 171 N. C., 818; *S. v. Rountree,* 181 N. C., 535. It is not the province of this Court to weigh the testimony and determine what the verdict should have been, but only to say whether there was any evidence for the jury to consider; if there was, the jury alone could determine its weight. *S. v. Cooke,* 176 N. C., 731.

From a critical examination of the evidence, which covers about twenty-five pages, we are convinced that there was no error in denying Nellie's motion to dismiss the action. It is true that a disclosure of the facts attending the homicide is dependent to a large extent upon her testimony; but there is at least some testimony and some natural evidence in contradiction, the consideration of which we cannot withhold from the jury.

The entire evidence points with certainty to one of two conclusions: the deceased killed himself or his wife killed him. Unquestionably there is evidence in support of the theory that the deceased himself fired the fatal shot. But the question for decision is whether there is any evidence which, taken to be true, is inconsistent with this theory. The evidence relied upon by the State, if accepted by the jury, discloses circumstances which tend to repel the probability, if not the possibility, of suicide.

For error in the admission of testimony Nellie Carr is entitled to a new trial.

As to Robert Carr, reversed. As to Nellie Carr, new trial.

LARRY DAWSON AND D. G. WHITE, TRADING AS DAWSON & WHITE, v. NATIONAL BANK OF GREENVILLE, AND W. S. MOYE AND J. J. GENTRY, TRADING AS MOYE & GENTRY.

(Filed 10 October, 1928.)

Bills and Notes—Checks—Acceptance and Liability of Drawee Bank.

While a bank is not liable to the payee of a check for moneys drawn on it by a depositor having sufficient funds therein until acceptance or certification by the bank, C. S., 3171, acceptance may be evidenced in various ways, as where it pays the check without endorsement to some person unauthorized by the payee to receive it and charges the amount to the depositor's account, and where evidence on this point is conflicting an issue is raised for the jury, and a judgment as of nonsuit should be denied. The question of the maker's liability to the bank under a written instruction to pay the check as if made payable to bearer is not presented by the record, and is not decided.

APPEAL by plaintiffs from *Grady, J.*, at May Term, 1928, of PITT. Reversed.

This is an action to recover of defendant bank the proceeds of a check drawn on said bank by Moye & Gentry, and payable to the order of plaintiffs. It is alleged in the complaint that said check, without the endorsement of plaintiffs or of either of them, was presented to the bank for payment by some person without the authority of plaintiffs, and that the bank paid the amount of said check to such person, and charged the said amount to the account of the drawers, Moye & Gentry. It is further alleged therein that the proceeds of said check have not been paid to plaintiffs or to either of them.

The defendant bank, answering the allegations of the complaint, denied that said check was presented for payment by some person without authority of plaintiffs or that payment of the proceeds of said check was made to a person who was without authority from plaintiffs to receive the same. It alleged that payment was made to plaintiffs or to one of them, or if not, to some person who was authorized by plaintiffs to present said check for payment and to receive the proceeds of the same. Upon motion of defendant bank Moye & Gentry, the drawers of the check, were duly made parties defendants in the action. It is admitted in their answer, as alleged in the answer of defendant bank, that the said Moye & Gentry had authorized the defendant bank to pay said check, without the endorsement of the payees named therein, just as if said check had been payable to bearer. Moye & Gentry are engaged in business as warehousemen for the sale of leaf tobacco, and pay for tobacco sold by them by checks on defendant bank. They had authorized the defendant bank to pay their checks drawn on it, by letter addressed to said bank and signed by them, as follows:

"Dear Sirs: Although our Farmers' checks are payable 'to order,' we will thank you to pay them as if payable to 'bearer,' without requiring them to be endorsed, or the holder identified."

In paying said check, without endorsement of plaintiffs, payees named therein, defendant bank relied upon said letter as its authority so to do. Both the defendants in their answers allege that the check was presented for payment by and that payment was made to the plaintiffs, or to one of them, or, if not, to some person who was authorized by plaintiffs to make such presentment and to receive such payment.

From judgment dismissing the action, upon motions of both defendants, at the close of the evidence offered by plaintiffs, plaintiffs appealed to the Supreme Court.

Albion Dunn for plaintiffs.
F. G. James & Son for National Bank of Greenville.
J. C. Lanier for Moye & Gentry.

CONNOR, J. It is admitted in the pleadings in this action that the check dated 21 October, 1926, drawn by Moye & Gentry, and payable to the order of plaintiffs, was presented for payment to defendant, the drawee bank, without endorsement, during the day on which it was drawn; and that the defendant bank paid the proceeds of said check to the person who made such presentment and charged the amount thereof to the account of the drawer. The only issue of fact arising upon the pleadings is as to whether presentment was made by, and payment made to plaintiffs, or to some person authorized by them to make such presentment and to receive such payment. There was evidence on behalf of plaintiffs tending to show that presentment was not made by and that payment was not made to plaintiffs or to either of them, and that the person who presented the check for payment and to whom payment was made was not authorized by plaintiffs, or by either of them to make such presentment or to receive such payment. It was, therefore, error to allow defendants' motion for judgment as of nonsuit, at the close of plaintiffs' evidence, and to dismiss the action, unless upon all the facts admitted in the pleadings, or shown by the evidence, plaintiffs are not entitled to recover of either of the defendants in this action. Upon this appeal it is assumed, as plaintiffs' evidence tends to show, that the check was presented by and that payment was made to some person, who was without authority from plaintiffs or from either of them to present the check, or to recover payment therefor. This assumption is in accordance with the well established rule that upon a motion for judgment as of nonsuit the evidence is construed most strongly for the plaintiff.

The law in this State, both by statute and by authoritative decisions of this Court, is to the effect that the payee of a check cannot maintain an action upon the check against the bank on which the check is drawn, unless and until the check has been accepted, or certified by the bank. C. S., 3171. *Trust Co. v. Bank,* 166 N. C., 112, 81 S. E., 1074. Until the check is accepted or certified by the drawee bank, there is no contractual relation between the payee or holder of the check, and the drawee bank, out of which a cause of action founded upon the check can arise in favor of the payee or holder, and against the bank. By its acceptance or by its certification of the check, the drawee bank becomes liable to the payee or holder, who may thereafter maintain an action on the check against the bank, because the bank has by its acceptance or certification assented to the order of the drawer for the payment of the check, and contracted to pay the amount of the check to such payee or holder. The bank, after its acceptance or certification of the check, is entitled to credit for the amount thereof, as against the drawer. Although it has neither accepted a check drawn upon it, nor certified the check, the drawee bank may by its conduct with respect to such check become liable to the payee or holder, upon the check, or for its proceeds with the same effect as if it had formally accepted or certified the check.

In *Trust Co. v. Bank, supra,* it is said by *Walker, J.:* "We have held that where a bank has refused to pay a check the holder has no cause of action thereon against the bank, but must seek his remedy against the drawer, the bank being liable only to the drawer for its breach of promise to pay the check, there being an implied promise by the bank, arising from the deposit of his funds with it, that it will pay his checks when and as they are presented. If the bank fails to perform this promise, it becomes liable to the drawer for the damages sustained by him on account of its refusal or failure to pay his check. But the holder of the check can only sue the drawer, and cannot sue the bank. The reason why the holder of the check is not permitted to sue the bank has been stated by the authorities to be that there is no privity between the holder of the check and the bank, until by certification of the check or acceptance thereof, express or implied, or by any other act or conduct it has made itself directly liable to the holder." In support of this statement of the law, *Bank v. Bank,* 118 N. C., 783, 24 S. E., 524, and *Hawes v. Blackwell,* 107 N. C., 196, 12 S. E., 245, are cited.

In *First National Bank v. Whitman,* 94 U. S., 343, 24 L. Ed., 229, cited by *Walker, J.,* in *Trust Co. v. Bank, supra,* as authoritative, it is said: "We think it is clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it is drawn." It is, however, further said in the opinion in that case that "it is not to be doubted, however, that it is within the power of a bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. It may accomplish the same result by writing upon it the word 'good' or any similar words which indicate a statement by it that the drawer has funds in the bank applicable to the payment of the check and that it will so apply them. And such certificate it is said, discharges the drawer. As to him it amounts to a payment."

In the instant case it is admitted that upon presentation of the check, drawn by its depositor, who had to his credit with the bank an amount more than sufficient for the payment of the check, the drawee bank assented to the order of its depositor, retained the check, and charged the amount of the check to his account. The defendant bank then paid the proceeds of the check to the person who presented it for payment. Both the drawee bank and the drawers of the check allege that the check was paid by the bank. If the jury shall find from the evidence that the proceeds of the check were not paid to plaintiffs, or to some person authorized by the plaintiffs to present the check for payment and to receive said proceeds for or on behalf of plaintiffs, then plaintiffs as the payees of the unendorsed check are entitled to recover of defendant bank the proceeds of the check. The defendant bank admits that it assented to the order of the drawers of the check to pay out of their funds, on deposit with it, the amount named in the check; that it charged said amount to the account of the drawers, and that it retained the check in its possession. It thereby became liable to the owner of the check for its amount; the payment of this amount to some person other than the owner of the check, or to some person not authorized by said owner to receive payment, did not discharge the bank of this liability. *Pickle v. Peoples National Bank,* 88 Tenn., 381, 12 S. W., 919, 7 L. R. A., 93, 17 Am. St. Rep., 900.

In the above cited case, in which it is held that the acceptance of a check, so as to give a right of action to the payee, is inferred from the retention of the check by the bank, and a subsequent charge of its amount to the drawer, although it was presented by and payment made to an unauthorized person, *Lurton, J.*, writing the opinion for the Court, says: "Where a bank has negligently paid a check to an improper person, it would seem that, in good conscience, the true owner and payee ought not to be remitted to his action against a palpably insolvent drawer, for thereby he may lose his debt altogether. A legal principle, however, stands in the way, in that there is no privity between himself and the bank until the bank has assented to the order of the drawer requiring it to pay to the holder of the check the sum of money named. The assent which is necessary before there is any contract relation between the holder of the check and the bank is what is meant by acceptance. This assent need not be by endorsement of 'good' across the check, or by any other particular words, either in writing or oral. The question of assent or acceptance is one of fact, and may be made out by any of the methods by which a fact is proven."

The act or conduct of defendant bank, in the instant case, with respect to the check payable to the order of plaintiffs, and presented for payment without their endorsement, was in effect an acceptance of the check, and renders the bank liable to the true owner of the check for its proceeds.

We do not now decide, upon this record, whether or not, in any event, Moye & Gentry, the drawers of the check, are liable to plaintiffs, or whether or not they may be held liable to their codefendant, the National Bank of Greenville. These questions are not now presented for decision. The cause of action alleged in the complaint is not founded upon the check; plaintiffs do not demand judgment against the drawers of the check. They have sued the drawee bank. Moye & Gentry have been made parties defendant upon motion of defendant bank. The authority given by them to the bank to pay their checks, payable "to order" just as if made payable to "bearer," cannot affect the rights of plaintiffs. Whether in the event plaintiffs recover in this action of defendant bank, the drawers of the check may be held liable to the drawee bank, is not presented for decision.

There was error in sustaining the motion of defendants for judgment as of nonsuit, and in dismissing the action. The judgment must be

Reversed.

ANNIE FOSCUE, OR ANNIE FAUCETT, ADMINISTRATRIX OF JOHN FOSCUE, OR JOHN FAUCETT, v. GREENSBORO MUTUAL LIFE INSURANCE COMPANY AND MARY FAUCETT.

(Filed 10 October, 1928.)

Insurance—Forfeiture of Policy—Waiver or Agreements Affecting Forfeiture.

Where a local agent of an insurance company has exceeded his authority, contrary to the expressed terms of the policy of insurance, by extending the time for the payment of premiums, and the policy provides for forfeiture upon nonpayment of premiums, the agreement made by the local agent is not binding on the company, and the forfeiture for nonpayment will not be relieved against unless it be shown that the company has bound itself to the extension by the method prescribed in the policy, by its conduct and course of dealings, or by ratification.

CIVIL ACTION, before *Grady, J.*, at May Term, 1928, of PITT.

The plaintiff is the duly appointed administratrix of John Foscue.

The evidence tended to show that on or about 8 September, 1925, the Greensboro Mutual Life Insurance Company issued to John Foscue (sometimes known as John Faucett) an accident policy of insurance in the sum of $500. The policy was issued in consideration of a monthly premium of $3.40 paid in advance by the insured. The policy further provided that after three months from the date of the policy a grace period of ten days in payment of premiums was allowable. The policy further provided: "No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon."

The deceased was accidentally killed on 19 August, 1926. The deceased has paid all premiums due on the policy on or before the 10th day of each month up to August, 1926.

The evidence tended to show that the insured John Foscue or Faucett came to the agent of defendant who wrote the policy, and who had been collecting the premiums thereon, on or about the 4th or 5th of August, 1926, and told said agent that he only had $3.00, which was not sufficient to pay the premium of $3.40. The agent declined to take a partial payment upon the premium then due, but told the deceased that if he would take out a new policy and pay for the new policy that he would extend the time of payment of premium on the existing policy until the next pay day of the insured. Thereupon on 9 August, 1926, an industrial policy requiring a premium of 25 cents a week was issued to the deceased. The August premium of $3.40 had not been paid up to the death of the insured.

The only material controversy in the case grows out of the third issue submitted by the court, which was as follows: "Was the policy of insurance sued on in full force and effect at the time of John Foscue's death?"

All the issues were answered in favor of the plaintiff, and from the judgment rendered upon the verdict the defendant appealed. The record discloses that the defendant did not renew its motion of nonsuit at the conclusion of all the evidence.

S. J. Everett for plaintiff.
J. Con Lanier and P. R. Hines for defendant.

BROGDEN, J. The question is this: Has a soliciting or collecting agent of an insurance company the authority to waive the payment of premiums provided in a policy of insurance or extend the time of payment thereof?

The trial judge charged the jury: "Now, I charge you as a matter of law, and I quote to you from an opinion of the Supreme Court, where it says in the case of *Moore v. Accident Insurance Corp.,* reported in 173 N. C., 532: 'It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture if by any agreement, either express or implied, by the course of its conduct it leaves the insured honestly to believe that the insurance assessments will be received after the appointed day.'" I charge you this, gentlemen of the jury: "That the agent of the company who has the authority from the company to solicit and to write policies of insurance, and to receive the premiums thereon, is the agent for all purposes in making contracts governing the policy, and that if the agent of the company promised and agreed with John Foscue that he would carry him until the next pay day in consideration of his taking out another policy of insurance, and that John Foscue relied upon that promise, thinking his policy was in force, then the company would be liable, gentlemen, and it would not have lapsed. In other words, the company would have been responsible for the acts of its agent."

During the course of the judge's charge one of the jurors asked the judge if an agent could bind the company by a contract with the insured to carry over the premium, and the judge answered, "Yes." To these instructions the defendant excepted.

In *Graham v. Ins. Co.,* 176 N. C., 313, 97 S. E., 6, this Court said: "The plaintiff has failed to show any authority upon part of Mrs. Wall to make the guarantees claimed." As is said by *Ruffin, J.,* in *Biggs v. Ins. Co.,* 88 N. C., 141: "Where one deals with an agent it behooves him to ascertain correctly the extent of his authority and power to contract.

Under any other rule every principal would be at the mercy of his agent, however careful he might limit his authority." The authority of an agent with limited power to waive the terms and conditions of written policies of insurance in the absence of fraud or mistake or other compelling equitable principle is ordinarily restricted to negotiations connected with the inception of the contract and not to provisions of a written contract which has already taken effect and been in force for a period of time. Thus in *Johnson v. Ins. Co.,* 172 N. C., 142, 90 S. E., 124, it is declared: "The restrictions inserted in the contract upon the power of the agent to waive any condition unless done in a particular manner cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. The principle is not a new one, and has not been shaken by any decisions of our Court since the adoption of the standard policy."

It is undoubtedly the law that the courts do not favor forfeitures and that they will liberally construe in favor of the insured, acts or circumstances indicating an election to waive forfeitures or agreements to waive them, particularly when the insured has relied and acted upon such waiver. But the vital question is, "How can these provisions be waived and by whom?" The decisions are to the effect that a waiver may be established by the following methods: (1) Express agreement; (2) conduct or course of dealing; (3) ratification. *Moore v. Accident Assurance Corp.,* 173 N. C., 532, 92 S. E., 362; *Graham v. Ins. Co.,* 176 N. C., 313, 97 S. E., 6; *Paul v. Ins. Co.,* 183 N. C., 159, 110 S. E., 847; *Dawson v. Ins. Co.,* 192 N. C., 312, 135 S. E., 34; *Arrington v. Ins. Co.,* 193 N. C., 344, 137 S. E., 137; *Turlington v. Ins. Co.,* 193 N. C., 481, 137 S. E., 422. The principle is clearly expressed in an opinion written by *Allen, J.,* in *Gazzam v. Ins. Co.,* 155 N. C., 330, 71 S. E., 434, as follows: "Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company."

Applying these principles of law to the facts disclosed by the record, we find no evidence tending to show that the agent had either express or implied authority to waive the conditions plainly expressed in the policy; neither was there evidence of any course of dealing which would warrant an inference of a waiver. The policy by its terms allowed or permitted a grace period of ten days for the payment of premiums, and the evidence discloses without contradiction that all premiums were paid within such period, and that no part of the premium for the month of August had been paid. So far as the evidence discloses the agent was not an officer of the defendant company and was merely a local agent for selling insurance and collecting premiums. The following utterance of *Connor, J.*, in *Turlington v. Ins. Co., supra,* is pertinent to this aspect of the case: "All persons dealing with an agent do so with notice of this salutary principle of the law of principal and agent, which is too well established to require citation of authorities." *Bullard v. Ins. Co.,* 189 N. C., 34, 126 S. E., 179; *Hardin v. Ins. Co.,* 189 N. C., 423, 127 S. E., 353; *Smith v. Ins. Co.,* 193 N. C., 446, 137 S. E., 310.

Under these facts the exceptions of the defendant to the instructions given by the trial judge to the jury are sustained.

Error.

MOORE & DAWSON v. HIGHWAY ENGINEERING AND CONSTRUCTION COMPANY, FIRST NATIONAL BANK OF KINSTON, MURCHISON NATIONAL BANK, WACHOVIA BANK AND TRUST COMPANY, AND BRANCH BANKING AND TRUST COMPANY, RECEIVER OF BANK OF WARSAW.

(Filed 10 October, 1928.)

1. **Bills and Notes—Checks—Rights and Liabilities of Drawer, Payee, and Banks in Course of Collection.**

Where a check is received by the drawee bank from banks in course of collection, and the drawee bank marks it "paid" and charges the amount to the account of the drawer, and sends the collecting bank its draft on a third bank in payment, which draft is not paid because of insufficient funds: *Held,* the check was not paid by the drawee bank, its giving its worthless draft and marking the check "paid" not amounting to legal payment, and the debt of the drawer is not discharged thereby.

2. **Same.**

Where a check is drawn on a bank which was insolvent and unable to pay the same at the time the check was drawn, negligence of banks in course of collection, if any, in presenting the check for payment could not cause damage, and is not actionable.

APPEAL by plaintiffs from judgment of nonsuit rendered by *Harris, J.*, at April Term, 1928, of DUPLIN. Modified and affirmed.

H. D. Williams, Shaw & Jones and F. E. Wallace for plaintiffs.

R. D. Johnson for Highway Engineering and Construction Company.

Cowper, Whitaker & Allen and Biggs & Broughton for First National Bank of Kinston and Wachovia Bank and Trust Company.

Rountree & Carr and Bryan & Campbell for Murchison National Bank.

ADAMS, J. Whether there was error in nonsuiting the plaintiffs is to be determined by the application of established principles of law to certain facts, the most of which are admitted.

The Highway Engineering and Construction Company, while engaged in paving a part of the highway between Kenansville and Pink Hill under a contract with the State Highway Commission, became indebted to the plaintiffs for work performed as hauling contractors in the sum of three thousand one hundred and eighty-three dollars. On 9 April, 1926, for the purpose of paying this debt the Engineering and Construction Company drew its check on the Bank of Warsaw, Kenansville Branch, for the correct sum, payable to the plaintiffs. The check was dated 10 April, but was delivered to the plaintiffs after banking hours on the day preceding. Between nine and ten o'clock on 10 April the plaintiffs endorsed and delivered the check to the First National Bank of Kinston to be credited on their account, and credit was entered subject to final payment of the check by the bank on which it was drawn. On the same day the Kinston bank sent the check by mail in due course as an item for collection and credit to the Wachovia Bank and Trust Company at Raleigh. The check was received after business had been closed for the day; and as the eleventh of April was Sunday and the twelfth a legal holiday the check on 13 April was credited by the Wachovia Bank to the account of the First National Bank of Kinston. The Wachovia Bank and Trust Company then mailed the check for payment to the payee bank, Bank of Warsaw, Kenansville Branch, at Kenansville, where it was received on 14 April. The Kenansville Branch then drew its draft on the Murchison National Bank, of Wilmington, for the sum of $3,339.21, which included the check for $3,183 given to the plaintiffs, and on 15 April sent it by mail to the Wachovia Bank and Trust Company at Winston-Salem. When this was done the Bank of Warsaw, Kenansville Branch, stamped on the check for $3,183 the word "paid," filed it, and charged the amount to the account of the Engineering and Construction Company by whom it had been drawn. On 16 April the Wachovia Bank and Trust Company received the draft on the Murchison National Bank and sent it to the Federal Reserve Bank at Richmond, Virginia, which received it the next day and immediately mailed it to the Murchison National Bank for payment. The latter bank received the draft on 19 April, and on the next day informed the Federal Reserve Bank and the Wachovia Bank and Trust Company that the Bank of Warsaw, Kenansville Branch, did not have sufficient funds on deposit with it to pay the draft. The account of the Kenansville Branch was then overdrawn to an amount in excess of $14,000. The other transmitting banks and the interested parties were given similar notice. On 21 April, 1926, the Corporation Commission took possession of the property and assets of the Bank of Warsaw and of the Kenansville Branch, receivers were duly appointed, and neither bank has since been open for the transaction of business.

The plaintiffs contend that they are entitled to judgment against the Highway Engineering and Construction Company because the check given them has never been paid, and against the First National Bank of Kinston, the Murchison National Bank, and the Wachovia Bank and Trust Company for loss caused by their negligent failure to collect the check.

There is an allegation in the complaint that the Bank of Warsaw, Kenansville Branch, neither on 10 April nor at any time thereafter had funds sufficient and available for payment of the check drawn by the Engineering and Construction Company in favor of the plaintiffs. The plaintiffs offered evidence to this effect. The cashier testified that at no time between the fourteenth and the twenty-first of April did the Kenansville Branch have a sufficient amount of currency to pay the plaintiffs' check; that the assets of this bank were not mingled with those of the Bank of Warsaw; that with the exception of the capital stock the institutions were entirely separate; and that he "did not get money from the Bank of Warsaw to pay the obligations of the Kenansville Branch." This, we understand, is alleged by the plaintiffs and admitted. At least there is no evidence in contradiction. In these circumstances the mere cancellation of the check was not a payment by the Kenansville Branch. Payment is the discharge of a debt by the delivery of money or other thing of value; it is the fulfilment of a promise or the performance of an agreement. In a strict legal sense there must be a delivery by the debtor and an acceptance by the creditor of money or its equivalent with intent in whole or in part to pay a debt or to satisfy an obligation. 30 Cyc., 1181; Black's Law Dictionary. The Kenansville Branch gave nothing of value for the canceled check and disbursed no part of its assets by filing the check impressed with a false endorsement of payment. The check therefore was not paid; and if it was not, the debt for which it was given is still unsatisfied. *Hayworth* *v. Ins. Co.,* 190 N. C., 757. It may be noted that there is a vital distinction between the facts in the case before us and in *Dewey v. Margolis,* 195 N. C., 307, and *Quarles v. Taylor, ibid.,* 313.

As the bank upon which the check was drawn did not make payment and could not because it was insolvent and had no funds out of which payment could be made, it is not easily perceived how the utmost diligence on the part of the transmitting and receiving banks could have hastened or secured collection of the check. The judgment is affirmed as to all the defendants except the Highway Engineering and Construction Company whose debt to the plaintiffs has not been paid.

Modified and affirmed.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY ET AL. v. RUFUS A. DOUGHTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 10 October, 1928.)

1. **Taxation — Constitutional Requirements and Restrictions — Uniform Rule and Ad Valorem.**

   The North Carolina constitutional requirement that taxes for revenue only should be levied on property by a uniform rule according to its true value in money, Article V, section 3, is very broad in the legal significance of the language used, and includes both tangible and intangible property, and taxes on "trades, professions, franchises, and incomes."

2. **Same—Classification of Property, Trades, and Franchises, Etc.**

   While the subjects of taxation may be classified by the Legislature under the uniform rule prescribed by the Constitution, Article V, section 3, and under the "equal protection clause" of the Constitution of the United States, Fourteenth Amendment, section 1, the classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes.

3. **Same—"Chain Stores."**

   Chapter 80, section 162, Public Laws of 1927, which imposes a license tax of fifty dollars each on stores operated in this State when there are six or more such stores under the same management, but which imposes no such tax on other mercantile establishments doing the same business when there are less than six stores under one management, is an arbitrary classification, and unconstitutional.

STACY, C. J., and CLARKSON, J., concurring.

APPEAL by defendant from *Cranmer, J.,* at February Term, 1928, of WAKE. Affirmed.

The above-entitled action was begun in the Superior Court of Wake County on 5 December, 1927, to recover money paid by each of the plaintiffs to defendant, Commissioner of Revenue of North Carolina.

The said money was paid as a license tax for the privilege of maintaining and operating in this State chain stores as defined by statute. The money was demanded of plaintiffs by defendant under and by virtue of the provisions of section 162 of chapter 80, Public Laws 1927. Prior to the commencement of this action each of the plaintiffs had complied with the requirements of section 464 of chapter 80, Public Laws 1927. It was agreed by and between plaintiffs and defendant that plaintiffs might join in one action, rather than bring separate actions, for the recovery of the money paid by each of the plaintiffs.

Plaintiffs demand the return to them of said money upon the ground that the statute, under and by virtue of which it was demanded and paid, is null and void, (1) for that said statute contravenes section 3 of Article V of the Constitution of North Carolina, and (2) for that its enactment by the General Assembly of this State was in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

By consent, a trial by jury of the issues of fact arising upon the pleadings was waived, and the court heard the evidence offered by both plaintiff and defendant, and from said evidence found the facts in controversy. Upon these facts, and the facts admitted in the pleadings, the court was of opinion that section 162 of chapter 80, Public Laws 1927, the statute under and by virtue of which the money was demanded and paid, is null and void.

In accordance with this opinion, judgment was rendered that plaintiff recover, each, the money paid to defendant, as a license tax, together with penalties collected, interest and costs.

From this judgment defendant appealed to the Supreme Court.

Sullivan & Cromwell and Tillett, Tillett & Kennedy for The Great Atlantic and Pacific Company.

Pender, Way & Foreman and McLean & Stacy for The David Pender Grocery Company.

Perry & Kittrell for Rose's Five, Ten and Twenty-five-cent Stores, Incorporated.

Davis, Auerback & Correll and Pou & Pou for F. W. Woolworth Company.

Gwinn & Pell and Pou & Pou for J. C. Penny Company.

Douglass, Armitage & McCann and Pou & Pou for G. R. Kenny Company, Inc.

Murray Allen for Milner Stores, Inc., L. S. Hereford Company, Inc., and Guilford-Forsyth Grocery Company.

W. C. Newland for Carolina Stores, Inc.

Tillett, Tillett & Kennedy for L. B. Price Mercantile Company.
R. H. Sykes for M. Samuels Company.
Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendant.

CONNOR, J. This appeal was duly docketed in this Court at Spring Term, 1928, after the call of appeals from the Seventh Judicial District. It was heard on 3 May, 1928, pursuant to a special order. Full and exhaustive briefs were filed in behalf of both appellant and appellees. The contentions of the parties were fully and ably presented at the hearing by their respective counsel in their oral arguments. The question to be decided by this Court involves the validity of a statute duly enacted by the General Assembly of this State, for the purpose of raising revenue for the payment, in part, of the expenses of the State Government, and of appropriations for the support of the State's educational, charitable and penal institutions and for other State purposes. Section 443, chapter 80, Public Laws 1927. The validity of the statute is challenged by the plaintiffs in this action upon the ground that it is in violation of provisions of both State and Federal Constitutions, and therefore null and void. In view of the importance of this question, both to plaintiffs and to the State, the appeal was continued, upon an advasari, to this term. After a careful examination of authoritative decisions of the Supreme Court of the United States, and also of decisions of this Court, and of courts of other States, pertinent to the question to be decided, we have concluded that there was no error in the trial of the action in the Superior Court of Wake County. Appellant's assignments of error in this court cannot be sustained. The judgment is therefore affirmed.

Plaintiffs are retail merchants, engaged in business in this State. Some of them are corporations; the others are partnerships. The partnerships are composed of citizens of this State. Some of the corporations are organized under the laws of this State; others are organized under the laws of other States. All of the latter have domesticated under the laws of this State, and are therefore authorized to do business in this State. Each of the plaintiffs maintain and operate in this State six or more stores or mercantile establishments, all under the same general management, supervision or ownership, by means of which they carry on their business as retail merchants. Plaintiffs have paid all taxes levied upon or assessed against them or their property, for which they were liable, under the laws of this State, prior to the commencement of this action. The stores maintained and operated by plaintiffs do not increase fire hazards, do not endanger the health or morals of the communities in which they are established, and do not require increased or additional police protection, different from stores maintained and operated by other merchants doing a like or similar business, who are not required by the provisions of section 162 of chapter 80, Public Laws 1927, to pay a license tax. The license tax demanded of plaintiffs and paid by them, under and by virtue of said statute, is not imposed in the exercise of the police power of the State; it is imposed upon persons, firms, corporations, or associations who are, by the terms of the statute, liable therefor, in the exercise of the power to levy taxes solely for revenue purposes.

Each of the plaintiffs has paid the license tax demanded by the defendant, Commissioner of Revenue of North Carolina, under and by virtue of the provisions of section 162 of chapter 80, Public Laws 1927, which is as follows:

"Section 162. *Branch or chain stores.* That any person, firm, corporation, or association operating or maintaining within this State, under the same general management, supervision or ownership, six or more stores or mercantile establishments, shall pay a license tax of $50 for each such store, or mercantile establishment in the State, for the privilege of operating or maintaining such stores or mercantile establishments."

There are merchants doing a like or similar business within this State as that done by plaintiffs, who are not required by the provisions of this statute to pay a license tax, for the reason that they maintain and operate less than six stores or mercantile establishments by means of which they carry on their business. These merchants are exempt by the statute from the payment of any license tax; they exercise the same privilege as that exercised by the plaintiffs, without paying to the State any license tax for such privilege. The only real and substantial difference between merchants who are required, and those who are not required, to pay a license tax to the State for the privilege of carrying on their business, under and by virtue of the statute, is the number of stores or mercantile establishments maintained or operated by them. Plaintiffs and other merchants who maintain or operate within this State, under the same general management, supervision or ownership, six or more stores or mercantile establishments, are required by the statute to pay a license tax for each such store or mercantile establishment, including the five, which if they did not maintain or operate as many as six, would be exempt from any license tax.

Each of the plaintiffs has paid, under protest in writing, the license tax for which under the terms of the statute it is liable, as required by the defendant, Commissioner of Revenue of North Carolina. Having complied with all the requirements of section 464 of chapter 80, Public Laws 1927, by this action they demand the return to them of the money so paid. They allege and contend that upon the face of the statute, and upon the facts admitted in the pleadings and found by the court, from the evidence, the classification made in the statute, for the purpose of taxation only, is arbitrary, unreasonable and unjust, there being no real and substantial difference between the plaintiffs, who are required to pay, and other merchants, doing a like or similar business, who are not required to pay, a license tax for the privilege of carrying on their several businesses.

Section 3 of Article V of the Constitution of North Carolina provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money." It is held in *Redmond v. Commissioners,* 106 N. C., 122, 10 S. E., 845, that the words "all real and personal property" used in the second clause of said provision are to be taken in their most comprehensive legal import; they include every kind of real and personal property whatever, not excepting the several classes of personal property expressly mentioned in the first clause of said provision. The rule of uniformity, as expressly prescribed in the Constitution, applies to taxes on all property, real and personal, tangible and intangible. The General Assembly, in which is vested the legislative power of the State, in passing laws taxing property is required by the Constitution not only to observe the rule of uniformity both as to rate of taxation and as to assessment of property taxed, but also to provide for the assessment of all property, subject to taxation, according to its true value in money. All taxes upon property in this State for the purpose of raising revenue for State, county or municipal purposes have been imposed and levied in strict conformity to this well settled principle.

It is further provided in said section that "The General Assembly may also tax trades, professions, franchises, and incomes." There are no restrictions or limitations in said provision or elsewhere in the Constitution, upon the power of the General Assembly to tax trades, professions, franchises and incomes, except that the rate of tax on incomes shall not in any case exceed six per cent, and that certain exemptions from said tax shall be allowed. The rule of uniformity, prescribed by the express language of the Constitution with respect to taxes on property, is not expressly applied therein to such taxes, as the General Assembly, in the exercise of its legislative discretion and judgment shall impose on trades, professions, franchises, and incomes. However, it has been held by this Court, in *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000, that the rule of uniformity applies to such taxes as well as to taxes on property, it being considered, says *Walker, J.,* "that a tax not uniform, as properly understood, would be so inconsistent with natural justice and with the intent so apparent in the section we have quoted (viz., section 3 of

Article V), that its collection would be restrained as unconstitutional. *Gatlin v. Tarboro,* 78 N. C., 119; *Worth v. R. R.,* 89 N. C., 291. And this may be taken as the settled construction of this section."

There have been no subsequent decisions of this Court overruling, modifying, or to any extent calling in question this statement of the law. The principle is recognized by the General Assembly, and is generally followed by it in passing laws taxing trades, professions, franchises and incomes. It must be assumed that if, in any instance, the principle has been violated, such violation was inadvertent on the part of the General Assembly and not with a purpose to violate it, or to question its validity.

Notwithstanding, however, that the rule of uniformity, applied in the Constitution to taxes on property, has also been held as applicable to taxes on trades, professions, franchises and incomes, when imposed by the General Assembly in the exercise of its legislative discretion and judgment, the power of the General Assembly to classify the subjects of such taxation, whether the taxation be for the sole purpose of raising revenue, or under the police power, has been fully recognized, and is well settled by authoritative decisions of this Court. The power to classify, however, must be exercised subject to the limitation that classifications, for the purpose of taxation, must not be arbitrary, unreasonable or unjust. There must be some real and substantial difference to justify the classification.

In *S. v. Williams, supra,* it is said that it may be considered as settled that, in laying the tax, the different subjects may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it was made.

In *Land Co. v. Smith,* 151 N. C., 70, 65 S. E., 641, it is said that the power of the General Assembly in the matter of classification is very broad and comprehensive, and that such power is subject only to the limitation that the classification must be made upon some "reasonable ground"; to justify the exercise of the power there must be something that bears a just and proper relation to the attempted classification; there must not be a mere arbitrary selection by the law-making body.

Whether section 162 of chapter 80, Public Laws 1927, contravenes section 3 of Article V of the State Constitution, must therefore be determined by a consideration of the contention of plaintiffs that the classification attempted to be made therein, for purposes of taxation, is arbitrary, unreasonable and unjust, and that the statute is therefore null and void. The principles of law applicable are clear and well settled; it only remains to determine whether this contention must be sustained upon the ground that the classification attempted to be made renders the tax imposed invalid. Before determining this question we shall consider the further contention of plaintiffs that the enactment of this statute is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, for that by the terms of the statute plaintiffs are deprived of the equal protection of the law, contrary to the provision of said section that no State shall "deny to any person within its jurisdiction the equal protection of the laws." In deciding the question presented by this contention, decisions of the Supreme Court of the United States, pertinent thereto, are controlling upon us and must be accepted as authoritative.

In *Louisville Gas & Electric Co. v. Coleman,* decided by the Supreme Court of the United States on 30 April, 1928, it is said by *Southerland, J.,* writing for the Court:

"The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky R. Tax Cases,* 115 U. S., 321, 337, 29 L. Ed., 414, 419; *Magoun v. Illinois Trust and Savings Bank,* 170 U. S., 283, 293, 42 L. Ed., 1037, 1042, and that it applies to the exercise of all the powers of the State which can affect the individual or his property, including the power of taxation. *Santa Clara County v. So. Pac. R. Co.,* 18 Fed., 385, 388-399, *Re Railroad Tax Cases,* 13 Fed., 722, 723. It does not, however, forbid classification; and the power of the State to classify for purposes of taxation is of wide range and flexibility, provided always that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *F. S. Royster Guano Co. v. Virginia,* 253 U. S., 412, 415, 64 L. Ed., 989, 990; *Airway Electric Appliance Corp. v. Day,* 266 U. S., 71, 85, 68 L. Ed., 169, 177; *Schlesinger v. Wisconsin,* 270 U. S., 230, 240, 70 L. Ed., 557, 564, 43 A. L. R., 1224. That is to say, *mere* difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." See, also, *Quaker City Cab Co. v. Commonwealth of Pennsylvania,* decided on 28 May, 1928, in which *Butler, J.,* also writing for the Court, says: "The equal protection clause does not detract from the right of the State justly to exert its taxing power, or prevent it from adjusting its legislation to differences in situation, or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. *Power Co. v. Saunders,* 274 U. S., 490, 493, 71 L. Ed., 1165."

It will be observed from the authorities hereinbefore cited that, while the power of the General Assembly to make classifications, for purposes of taxation, is recognized, both by the Supreme Court of the United States and by this Court, it is held by this Court that such classification, when arbitrary, unreasonable and unjust, contravenes the provisions of section 3 of Article V of the State Constitution, and by the Supreme Court of the United States that classifications subject to the same condemnation are in violation of the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States.

The principles of law applicable to a decision of the question here presented being well settled, it only remains for us to decide whether the classification made in section 162 of chapter 80, Public Laws, by virtue of which plaintiffs are required to pay a license tax, and other merchants, doing a like or similar business within this State, are not required to pay such tax, can be sustained, either upon the face of the statute, or upon the facts admitted in the pleadings and found by the court below. We concur with the opinion of the Superior Court of Wake County that the classification cannot be sustained either upon the face of the statute or upon the facts admitted in the pleadings and found by the court.

The classification made in the statute, by which a license tax is imposed upon retail merchants, who maintain or operate, under the same general management, supervision or ownership, six or more stores or mercantile establishments, and by which other retail merchants, who maintain or operate a less number of stores or mercantile establishments than six are exempt from such tax, cannot be held as founded upon a real and substantial difference between the two classes. The classification attempted for the purpose of imposing a license tax upon merchants falling within one class, and exempting merchants falling within the other class is, we think, under the authorities, clearly arbitrary, and if enforced would result in depriving merchants who are within the first class, of the equal protection of the laws of this State. It is immaterial that persons, firms, corporations or associations, liable under the terms of the statute for a license tax, are designated therein as owners of chain stores. Their business differs from the business of other merchants, not taxed by the statute, only in matters of detail and methods of buying and selling merchandise. No question of public policy with reference to chain stores is presented on this record. The statute whose validity is challenged by plaintiffs was enacted by the General Assembly solely for the purpose of raising revenue; it is so admitted by the parties to this action; there is no suggestion in the statute, or upon the facts disclosed at the trial to the contrary. The license tax imposed by this statute and paid by the plaintiffs, who under the admitted facts are included within the class made liable for a license tax, is illegal, for the reason that the statute is in violation of the Constitution, both of this State and of the United States. Each of the plaintiffs is entitled to recover the money paid to the defendant as a license tax.

There was no error on the trial of this action in the Superior Court of Wake County. The judgment is

Affirmed.

STACY, C. J., concurring: It is provided by section 162, chapter 80, Public Laws 1927, that any person, firm, corporation or association operating or maintaining within this State, under the same general management, supervision or ownership, six or more stores or mercantile establishments, shall pay a license tax of $50 for each such store or mercantile establishment so operated or maintained in this State.

It will be observed that the tax in question is not laid on chain stores *per se* nor on the business of operating chain stores. It is directed only against the operation or maintenance, within this State, of six or more stores, or mercantile establishments, under the same general management, supervision or ownership. Five or any less number of such stores or establishments may be operated or maintained free from any tax under the statute, but if the number be increased to six, then not only is the sixth one taxed, but the first five also. Hence the tax would seem to be directed against six or more stores or mercantile establishments operated or maintained under the same general management, supervision or ownership. Any number of stores may be maintained as chain stores without liability to the tax, provided not more than five are operated under the same general management, supervision or ownership. This, to my mind, is an arbitrary distinction and denies to the plaintiffs the equal protection of the laws.

CLARKSON, J., concurring: The vice of the license tax to my mind is in the fact that when the sixth store is taxed it is retroactive, and not only is the sixth store taxed but the first five also.

EFFIE M. WHITEHURST v. ROLAND GARRETT.

(Filed 10 October, 1928.)

1. **Chattel Mortgages—Transfer of Property by Mortgagor—Authority to Transfer—Principal and Agent.**

   Where a mortgagee of an automobile permits the mortgagor, a dealer, to keep it on display at his show room for sale with others therein, and the mortgage sufficiently describes the property, giving the serial and motor numbers, and is duly registered under the provisions of C. S., 3311, the mortgagee by his conduct does not lose his right of lien as against a subsequent purchaser from the dealer, and the doctrine of implied authority to the dealer to sell the machine free from the mortgage lien as agent of the mortgagee does not apply under the facts of this case.

2. **Chattel Mortgages—Registration and Indexing—Sufficiency of Index and Cross-Index.**

   Where for years a proper index of chattel mortgages has been kept in the books wherein the instruments were registered, it is a substantial compliance with the requirements of C. S., 3560, 3561, that the board of commissioners of a county "shall cause to be made and consolidated into one book a general index of all deeds and other documents in the register's office," it appearing that the record of the instrument could have been found with an ordinary search such as a man of ordinary prudence would have made.

3. **Same.**

   An indexing of chattel mortgages is an essential part of their registration. C. S., 3360, 3361; C. S., 3311.

APPEAL by plaintiff from *Clayton Moore, Special Judge,* at February Term, 1928, of PASQUOTANK. Reversed.

This is a civil action of claim and delivery instituted by plaintiff against defendant. The plaintiff claims title to one Pontiac automobile by virtue of a chattel mortgage conveying four automobiles to her, executed 4 August, 1926, and recorded 7 August, 1926.

A. W. Lane, trading as The Lane Motor Company, was an automobile dealer in Pontiac and Studebaker automobiles, in Elizabeth City, N. C., and had been in business there about two years. On 14 August, 1926, defendant bought from him a Pontiac automobile. The automobiles, one of which defendant purchased, and on which plaintiff had a chattel mortgage recorded, were kept in a show or display room of defendant, on the corner of Main and Road streets, in Elizabeth City, N. C., which is one of the most public corners in said city. The show or display room had a glass front. Lane kept in the show or display room an average of two to five cars for sale. The cars were kept by Lane to demonstrate and sell to any prospect he might be able to get and to the general public.

At the time defendant purchased from A. W. Lane the Pontiac automobile from the show or display window, there was a mortgage on it to plaintiff, made and executed 4 August, 1926, and recorded in the office of the register of deeds for Pasquotank County on 7 August, 1926. The mortgage was given to secure a note of $2,000, for money loaned, dated 4 August, 1926, and due 4 September, 1926. The property in the chattel mortgage was described as follows: "One Studebaker Duplex Phaeton, Serial Number 3141200, Motor Number 20,189—new. One Studebaker Touring Car—used—Serial Number 3073768—Motor Number 65,752. One Pontiac Coupé—Serial Number 38838—Motor Number 39,475—new. One Pontiac Sedan—Serial Number 38716—Motor Number 39,325—new. Also the following Life Insurance Policy on my life, and payable to my estate. Life Policy No. 102,870—North American Life Insurance Co., for $10,000. All of said property is free and clear of any and all liens and encumbrances, and title to same fully vested in me."

Lane continued in business in Elizabeth City until 9 October, 1926, when he disappeared, and on 13 October plaintiff notified defendant by letter of her mortgage. Defendant did not go to the register of deeds' office before he purchased the automobile, but afterwards found the mortgage on record with the aid of the register of deeds.

Plaintiff testified in part: "I knew that he was an automobile dealer, and had a show and display room on the corner of Main and Road streets, and that for several years he had been conducting a general dealer's business in Pontiac and Studebaker automobiles at that point. I knew that the cars that were kept in that show room were kept there for the purpose of indiscriminate sale to anybody who wanted to buy. . . . I never saw the automobiles I had the mortgage on. I should judge they were in this show room. I never made any effort to take them from his show room. I cannot say they were there at the expiration of thirty days. I live within one block of the show room, and pass it several times a day when I am in town. *I did not know this Pontiac was one.*"

The testimony of the attorney who drew the mortgage: "That prior to the execution of the mortgage in question he looked up the records in the courthouse, he examined the title registration of the cars, and that he had seen and examined the cars mentioned in the mortgage and checked up the motor and engine numbers, and that the cars described in the mortgage were in Lane's show room at the time the mortgage was executed." The plaintiff further testified: That the attorney prepared the mortgage, having been employed by Lane for that purpose.

J. C. Spence, the register of deeds, testified: "All chattel mortgages are indexed in the chattel mortgage book in my office and nowhere else.

They are cross-indexed in the front of each chattel mortgage record. Each paper is indexed and cross-indexed in that book. That is the permanent cross-index to chattel mortgages in Pasquotank County. Chattel mortgages have been so recorded in this county ever since I went in there in 1900, and so far as I have noticed all the time before that. Chattel mortgages in each chattel mortgage book are cross-indexed in an index in the front of that book. Each cross-index contains the chattel mortgages which are recorded in that book, and contains an index of them both on the grantee and grantor sides or rather on both the mortgagee and mortgagor sides. During my connection with the office and so far as my knowledge extends there has been no other cross-index record kept of chattel mortgages in Pasquotank County. . . . I don't keep any cross-index to chattel mortgages in a single index book. It has never been kept that way in this county. We do keep a general large index for all land papers. . . . As a matter of fact, a chattel mortgage on a new automobile given in 1926, would have been registered in one of the last three or four chattel mortgage books. Sometimes we run one chattel mortgage book a year, sometimes a little over, maybe sometimes one and a half."

At the close of all the evidence, upon motion of the defendant, the court below rendered judgment as in case of nonsuit against the plaintiff. C. S., 567. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Thompson & Wilson for plaintiff.
McMullan & LeRoy for defendant.

CLARKSON, J. The questions presented: (1) Can automobiles bought for the purpose of sale to the general public, exposed for such sale at the place of business of a licensed dealer, be the subject of a valid chattel mortgage as against a purchaser for value and without actual notice? (2) Is the indexing and cross-indexing of a chattel mortgage in the front of the chattel mortgage book in which it is recorded alone a sufficient compliance with sections 3560 and 3561 of the Consolidated Statutes? Under the facts and circumstances of this case, we think both questions must be answered in the affirmative.

C. S., 3311, is as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the State, then in the county where the said personal estate or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence."

It is said in *Door Co. v. Joyner,* 182 N. C., at p. 521: "In the construction of our registration laws this Court has very insistently held that no notice, however full and formal, will supply the place of registration. *Dye v. Morrison,* 181 N. C., 309; *Fertilizer Co. v. Lane,* 173 N. C., 184; *Quinnerly v. Quinnerly,* 114 N. C., 145. And under such interpretation there is doubt whether this doctrine of title by estoppel would be allowed to prevail against one holding by a prior registry, whether with or without notice. In the Georgia case heretofore cited *(Way v. Arnold),* 18 Ga., at p. 193, *Lumpkin, J.,* gives decided intimation that the doctrine of title by estoppel no longer prevails as against the provision and policy of our registration acts." *Bank v. Smith,* 186 N. C., p. 635; *Cowan v. Dale,* 189 N. C., 684.

In *Boyd v. Typewriter Co.,* 190 N. C., at p. 799, it is said: "In *Ijames v. Gaither,* 93 N. C., 361, it is held: 'When a mortgage or deed of trust is registered upon a proper probate, it is held to have the effect of notice to all the world and attaches itself to the legal estate, and is notice to a subsequent purchaser from the mortgagor. *Flemming v. Burgin,* 2 Ired. Eq., 584; *Leggett v. Bullock,* Busb., 283; *Robinson v. Willoughby,* 70 N. C., 358.' *Collins v. Davis,* 132 N. C., 106; *Dill v. Reynolds,* 186 N. C., 293; *Bank v. Smith,* 186 N. C., 642."

In this jurisdiction, under C. S., 3311, the registration of deeds of trust and mortgages on real and personal property have been held of prime importance. *Boyd v. Typewriter Co., supra.* It gives stability to business. When properly probated and registered, they are constructive notice to all the world. Creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, obtain no title as against a properly probated and registered conveyance, sufficiently describing the property. Ordinarily the cases in this jurisdiction where a purchaser for a valuable consideration from the donor, bargainor or mortgagor obtains title after the registration of the mortgage, it is bottomed on agency—express or implied—as where the mortgagee by the terms of the mortgage or the nature of the property conveyed, either in express language or by implication, gives the mortgagor the right to dispose of the property on which he has a lien.

In *Bynum v. Miller,* 89 N. C., at pp. 395-6, it is said by *Ashe, J.:* "The consent then given by plaintiff to defendant to replenish the stock from time to time, gave him the right to sell, and constituted him his agent for that purpose; and especially is this to be so considered when the deed provides that the entire stock on hand on 15 November, including not only the original stock, but the stock as increased by new purchases, should belong to the mortgagee." See *Etheridge v. Hilliard,* 100 N. C., 250; *Merritt v. Kitchin,* 121 N. C., 148; *Edwards v. Supply Co.,* 150 N. C., 171; *R. R. v. Simpkins,* 178 N. C., 276.

In *Rogers v. Booker,* 184 N. C., at p. 186, it is said: "This was not the case of a mortgage upon a stock of goods which was left in the hands of the mortgagor for sale. There was nothing to indicate in the remotest degree such state of facts. The evidence is that Carr E. Booker borrowed money from the plaintiff and gave him a mortgage upon a single automobile as security, and that this mortgage was duly and properly recorded, and upon the charge the jury found that Carr E. Booker had no authority, express or implied, to sell it free from the lien of the recorded mortgage."

The principal case relied on by defendant is *Boice v. Finance and Guaranty Co.,* 127 Va., 563. In the case of *Rudolph v. Farmers Supply Co., Inc.,* 131 Va., at p. 313, 108 S. E., 638, the same Court said: "The question presented was, who had the superior claim to the automobile—Boice or the guaranty company? Boice was a subsequent purchaser for value from Gordon, without actual notice of the existence of the mortgage. The Court held that 'If (when) the owner stands by and permits a seller who is a licensed dealer in such goods to hold himself out to the world as owner, to treat the goods as his own, to place them with other similar goods of his own in a public show room, and to offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by the recorded mortgage, or deed of trust in such cases, is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business, is just as destructive of the rights of the creditor as if such permission has been expressly granted in the mortgage or deed of trust.' *Boice v. Finance and Guaranty Co.,* 127 Va., 563, 102 S. E., 591, 10 A. L. R., 654. It will be noted in this case that the owner loses his lien because his conduct estops him from enforcing it. . . . (p. 314). The controlling principle asserted and established in *Boice v. Finance and Guaranty Co., supra,* is that the company's conduct was as destructive of its right to assert its lien as if it had expressly included in the mortgage provisions adequate to defeat its purpose."

Chapter 236, Public Laws of 1923, requiring a certificate of the transfer of title to an automobile to be issued to purchaser by the Secretary of State (now Commissioner of Revenue), making its violation a misdemeanor, is a penal statute and strictly construed, *in pari materia* with our registration laws, C. S., 3311, 3312, relating to the registration of mortgages. It does not repeal the latter statutes so as not to require the registration of title-retaining contract to secure the balance due on the purchase price of an automobile, as against subsequent purchaser for value, and no notice however formal is sufficient to supply that of registration required by the statute. *Carolina Discount Corporation v. Landis Motor Co.,* 190 N. C., 157.

Whatever may be the holding elsewhere, the registration of mortgages are favored in this jurisdiction. The mortgage in the present action was to secure a loan made at the time. The mortgaged property was carefully described in the mortgage, the kind of car and the serial and motor numbers. The mortgage was recorded before the sale to defendant. An attorney examined the title before the loan was made. Under the facts and circumstances of this case, we cannot hold that the fact that the automobiles were in the show or display room of Lane, a licensed dealer, for sale to the general public, that the purchase by defendant for value gave him a superior title to plaintiff, who had a valid chattel mortgage duly recorded on same. There is no sufficient evidence to show an implied agency giving the mortgagor a right to sell free from the mortgage lien. Defendant took title subject to the mortgage lien.

As to the second question: C. S., 3560, is as follows: "The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book a general index of all the deeds and other documents in the register's office, and the register shall afterwards keep up such index without any additional compensation.

C. S., 3561: The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made opposite each name, to the page, title or number of the book in which is registered any instrument. A violation of this section shall be a misdemeanor."

Davis v. Whitaker, 114 N. C., 279, was overruled in *Ely v. Norman.* 175 N. C., at p. 299 (concurring opinion), and it was held: "That the indexing of deeds is an essential part of their registration, just as much so as the indexing of judgments is an essential part of their docketing as is held in *Dewey v. Sugg,* 109 N. C., 328." *Fowle v. Ham,* 176 N. C., 12; *Hooper v. Power Co.,* 180 N. C., 651; *Trust Co. v. Currie,* 190 N. C., 260; *Clement v. Harrison,* 193 N. C., 825.

It was held in the *Clement case, supra,* at p. 828: "C. S., 3560, apparently contemplates that the index provided by the county commissioners shall be one book, constituting a general index of all instruments admitted to registration or required to be registered. The only requirement of cross-indexing specified in the statute is that such index and cross-index shall 'show the name of each party under the appropriate letter of the alphabet, and reference shall be made opposite each name to the page, title, or number of the book in which is registered any instrument.' "

In the instant case the chattel mortgages in each chattel-mortgage book are indexed and cross-indexed in an index in the front of that book. It may be burdensome to the investigator, but we think, under the facts and circumstances of this case, that there has been a substantial compliance with the statutes. Defendant, if he had investigated before purchasing the automobile, could have easily found the chattel mortgage *as he did afterwards.*

In speaking to the subject of protecting creditors and subsequent purchasers for value, the necessity of indexing and cross-indexing, *Hoke, J.,* in the *Ely case, supra,* at p. 298, says: "In cases upholding this view it is held: 'That an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found. *Jones v. Berkshire,* 15 Iowa, 248.' "

For the reasons given, the judgment below is

Reversed.

MADELINE FURLOUGH, ADMINISTRATRIX, v. NASH COUNTY HIGHWAY COMMISSION AND NELLO L. TEER.

(Filed 10 October, 1928.)

Appeal and Error—Petitions to Rehear.

Extraneous petitions to rehear filed by laymen who are not parties have no proper place in a petition to the Supreme Court to rehear a case.

Petition to rehear. See 195 N. C., 365.

PER CURIAM. Following the precedent recognized in *Cooper v. Board of Commissioners of Franklin County,* 184 N. C., 615, 113 S. E., 569, the *Justices* to whom the petition was referred submitted the same to the Court in conference.

The testimony was conflicting upon the question as to whether or not the road had been finished at the time of the injury sustained by plaintiff's intestate. There was testimony to the effect that the road had never been finished and that the engineers had no authority to accept the road. Indeed witness Cornwell testified without objection: "Mr. Teer had the road in charge at the time." The record discloses that the defendant made out a very strong case and the jury would have been fully and amply justified in finding the issues in his favor, but there was a conflict in the testimony, and under our system of jurisprudence, if there is any competent evidence upon an issue the weight of it is for the jury to determine.

There was also testimony to the effect that the pipe placed at the curve by the agent of the defendant gave the curve a deceptive appearance. If so, this was evidence of an independent act of negligence.

The defendant relies upon the case of *Overman v. Casualty Co.,* 193 N. C., 86, 136 S. E., 250, which was not called to the attention of the court at the former hearing. The question at issue in that case was whether or not the cause of action for material furnished a contractor was barred by the statute of limitations. It does not appear to us that the *Overman case* is in point. In the case at bar the liability of the defendant for negligence subsisted as long as he had the road in charge, and there was evidence tending to show that the road had not been completed at the time of the injury complained of.

In the petition to rehear there were certain extraneous petitions filed by outsiders not parties to the action and not attorneys at law. They were doubtless filed in good faith, but they have no place in the petition to rehear.

The petition to rehear has been given careful and diligent study and deliberation, and we find no sound reason for modifying or reversing the former opinion.

Petition denied.

JOSEPH STRICKLIN AND THEO. F. COLLINS v. JOHN C. DAVIS.

(Filed 10 October, 1928.)

Parties Defendant—Persons who Must be Sued in Action Against Railroad Under Federal Control.

The United States Director General of Railroads is a necessary and only party defendant in an action for negligence when the railroads were under government war control, and when the present incumbent has not been made a party, the action is properly dismissed.

APPEAL by plaintiffs from *Cranmer, J.*, at February Term, 1928, of LENOIR. Affirmed.

Shaw & Jones for appellant.
Rouse & Rouse for appellee.

PER CURIAM. On 25 April, 1921, plaintiffs brought suit against the Norfolk Southern Railroad Company, Seaboard Air Line Railroad Company, and the Randolph & Cumberland Railway Company for the recovery of damages for negligence in the transportation of certain horses and mules from Kinston in Lenoir County to Carthage in Moore County. On 29 January, 1924, plaintiffs filed their complaint alleging that the horses and mules were delivered to the initial carrier at Kinston on 4 December, 1919. The return of the officers shows service on the several railroads; and after complaint was filed James C. Davis entered a special appearance and moved to dismiss the action for the reason that between 1 January, 1918, and 29 February, 1920, the United States Government through the Director General of Railroads operated the railroads in question and that the railroads were not in the use, possession or control of their property. Thereafter an amended complaint was filed, and an answer thereto in which it is alleged that the suit had never been instituted against James C. Davis, Director General, as provided by section 206 of the Transportation Act of 1920. At the June Term, 1924, Judge Horton ordered that the original summons and all other process and pleadings should be amended so that the name of John C. Davis, Director General, should be corrected so as to read James C. Davis, Director General; also that the action be dismissed as to the several railroad companies which had been made parties defendant. James C. Davis's tenure as Director General continued from 26 January, 1921, to 14 December, 1925, and at the latter date he was succeeded by Andrew W. Mellon as Director General. It will be noted that Andrew W. Mellon has never been made a party and that the railroad companies are not parties defendant. Upon this ground Judge Cranmer at February Term, 1928, rendered judgment dismissing the action at the cost of the plaintiffs. In this judgment we find no error. *Mellon v. Lumber Company,* U. S. Advance Opinions, 16 January, 1928, p. 154.

Affirmed.

B. F. MONTAGUE v. ERNEST THORPE AND T. W. BREWER, TRADING AS S. W. BREWER & SON, AS INTERPLEADER.

(Filed 10 October, 1928.)

Landlord and Tenant—Rent and Advancements—Liens.

Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, and the lienor knows of the surrender at the time he made the advancements, his lien is secondary to that of the landlord's for rent, and a paper-writing of the agreement of surrender between the landlord and tenant was not necessary.

APPEAL by interpleader from *Cranmer, J.*, at Third March Term, 1928, of WAKE. No error.

This action arises out of a controversy between plaintiff and the interpleader with respect to priority of liens upon certain crops grown by defendant, Ernest Thorpe, during the year 1925, and delivered to the interpleader by the sheriff of Wake County, who had seized the same under a writ of claim and delivery issued in this action.

On 1 January, 1925, the relation of mortgagor and mortgagee existed between defendant Thorpe and the plaintiff, with respect to the land upon which the crops were grown. The debt secured by the mortgage was past due, and defendant was unable to pay the same. Pursuant to an oral agreement between them, defendant Thorpe surrendered possession of said land to the plaintiff, and contemporaneously with such surrender Thorpe became the tenant of the plaintiff, agreeing to pay as rent for said land for the year 1925 the sum of $125.

Thereafter, to wit, on 21 March, 1925, defendant Thorpe executed a crop lien (C. S., 2480) to the interpleader, T. W. Brewer, trading as S. W. Brewer & Son, to secure the payment of advancements to be made to him. Prior to the date on which the crop lien was executed, and prior to the making of said advancements, as found by the jury, the interpleader had notice that defendant Thorpe was in possession of said land, and was cultivating same, as tenant of plaintiff.

It was agreed that the crops made by defendant Thorpe on said land during 1925, and delivered to the interpleader by the sheriff of Wake County, exceeded in value the sum of $125, interest and the costs of this action.

From judgment that plaintiff recover of the interpleader the sum of $125, with interest and costs, the interpleader appealed to the Supreme Court.

Clyde A. Douglass for plaintiff.
Jones & Jones for interpleader.

PER CURIAM. Plaintiff as mortgagee was entitled to possession of the land conveyed to him by the mortgagor, certainly after default in the payment of the debt secured thereby. *Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491. The oral agreement by which defendant Thorpe, as mortgagor, surrendered possession of the land to the plaintiff, the mortgagee, was valid. The law does not require that such agreement shall be in writing, or that it shall be registered. The jury having found, from sufficient evidence, that the interpleader had notice of the oral agreement, and of the relationship existing between plaintiff and defendant Thorpe, by virtue of such agreement, the agreement was valid as against the interpleader. *Stevens v. Turlington,* 186 N. C., 192, 119 S. E., 210. The interpleader took his lien and made advancements under the same, with knowledge that defendant Thorpe was in possession of the land as tenant of the plaintiff. C. S., 2481, is therefore not applicable. Thorpe was not in possession of the land at the date of the lien as mortgagor, but as tenant. The crop lien was therefore subject to the lien of the landlord for rent.

The paper-writing signed by defendant Thorpe, containing statements relative to his title to the land, was properly excluded as evidence. It is clearly incompetent, upon the principle of *inter alios acta,* as evidence upon the only issue submitted to the jury. The judgment is affirmed. There is

No error.

STATE v. CLIFTON EARP AND RAY EARP.

(Filed 17 October, 1928.)

1. Criminal Law—Trial—Motion of Nonsuit.

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. C. S., 4643.

2. Forcible Trespass—Criminal Responsibility—Nature and Elements of the Crime.

The offense of forcible trespass under C. S., 4300, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction.

APPEAL by defendants from *Cranmer, J.,* and a jury, at March Term, 1928, of WAKE. No error.

The defendants were convicted of forcible trespass.

The evidence of James Johnson, prosecuting witness for the State, was to the effect that he rented a farm on halves from J. J. Norris, at Holly Springs, in Wake County, N. C.; he furnished the stock and did the work. Norris owned two places. On the place Johnson lived, which he rented from Norris, there was no barn or stables or crib. There was a strip of land between this place and the other place owned by Norris. On this latter place there was a barn and stables, which were rented to Johnson to keep his stock in in connection with the other place. He was in possession of same on 20 January, 1928; had his mules, fodder and raw food in the stables and corn in the crib. The stables were locked by Johnson. This was the third year Johnson had been in possession of the stables. Clifton Earp had moved on the place on 17 January where the barn was located. He told Johnson prior to the 20th to clear the barn and get the mules out, as he wanted to put his feed and mules in. Johnson told him he had the place rented for the year and he could not do it. "He (Clifton Earp) said he would give me three days to get them out. About fifteen minutes to 12 o'clock on 20 January I met Clifton Earp and he said, 'I told you to get those mules out of there by 12 o'clock' and also said, 'If you do not get them out I am going to catch them and turn them out.' I forbade him from interfering with anything in there or on that lot or barn, because it went with the farm. He said, 'You heard what I said.' I said, 'If you want my mules out you get papers and let the sheriff turn them out.'"

What occurred is described by Johnson as follows: "I went to a tobacco barn not far from the stables, and by that time my wife came down, and I was telling her what I told him, and we were where we could see the stables, and he came out to the barn at 12 o'clock and his brother was with him, and Mr. Norris behind them, and all three of them went down there, and he went in front of the stables, and I said, 'Come on, he is at the stables,' and I hurried out there, and just as I walked up to the first stable door he took a hammer and jerked the staples out, and opened the door, and I said, 'I forbid you from turning out my mules,' and I told him to catch them, and he said to me 'You catch them,' and I said, 'I am not going to do it, and I forbid you bothering it.' And I reached to hold the door, and it was dangerous, and I had it braced. Then I went around to the other door, and when he turns loose this door I started out and I hurried around to the other door, and when I got there he had jerked that out and opened the door, and his brother ran up to catch that mule, and I said to him, 'I forbid you from bothering with my mule,' and Ray said, 'If you say so I will go around there and get one of your mules and rush in there on top of mine,' and about that time Cliff walked away and went around to the other one, and by the time

I got there my wife had backed back, and mule ran out, and Mr. Cliff wheeled around and went to the other door and the other one ran out."

J. J. Norris, a witness for defendants, testified in part: "Last year up until in December I lived this side of Holly Springs. I left there about 16 January and Clifton Earp moved in. There is a barn belonging to the house place in the edge of the yard." Cross-examination: "Jim Johnson farmed with me for the two years, 1926 and 1927. I only had a cow. I had no stock of my own except a cow. *I furnished him stables at my house to keep the mules in and a barn to keep the feed in.*"

The assignments of error will be considered in the opinion.

Attorney-General Brummitt and Assistant Atorney-General Nash for the State.

J. C. Little for defendants.

CLARKSON, J. At the close of the evidence for the State, and at the conclusion of all the evidence, the defendants moved to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below refused the motion, and in this we think there was no error.

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. *S. v. Brinkley,* 183 N. C., 720, 110 S. E., 783; *S. v. White, ante,* 1.

The evidence tended to show that the prosecuting witness, Johnson, was in the actual possession of the stables and barn. Johnson's mules were in the stables. The stables had been locked by him. Clifton Earp and Ray Earp, the defendants, in company with J. J. Norris, went to the stables, and Clifton Earp took a hammer and jerked the staples out "and opened the door" and turned the mules out, and he did the same in regard to the other stable. Ray Earp, the other defendant, was present aiding. The prosecuting witness, Johnson, was present forbidding defendants. The defendants were indicted under C. S., 4300, which is as follows: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

"Forcible trespass is essentially an offense against the possession of another and does not depend upon the title." *S. v. Webster,* 121 N. C., 586; *S. v. Bennett,* 20 N. C., 170.

In *S. v. Armfield,* 27 N. C., at pp. 210-11, it is said: "The prosecutor was not compelled to prove that the defendants used actual force, before they could be guilty of the offense charged; for if the acts of the defendants, in the taking of the slave, *tended* to a breach of the peace, they were as much guilty of a forcible trespass as if an actual breach of the peace had taken place. We know the law to be, that where a person enters on land in the possession of another, and then, either by his behavior or speech, gives those who are in possession just cause of fear, that he will do them some bodily harm, if they do not give way to him, his entry is considered forcible, and therefore indictable. *S. v. Pollok,* 4 Iredell, 305. In the case of *S. v. Fisher,* 1 Dev., 504, it was held that the number of actors—three—by whom the prosecutor was overawed, and prevented from resisting, made their acts an indictable trespass."

If three men break open the prosecutor's crib and take and carry his corn therefrom, his son being present and forbidding them, they are guilty of a forcible trespass. *S. v. Drake,* 60 N. C., 238.

The court below charged the jury as follows: "That forcible trespass consists in entering upon land in the actual possession of another, with a strong hand. There must be either actual violence used, or such demonstration of force as is calculated to intimidate or alarm, or involve, or tend to a breach of the peace. The offense of forcible trespass is defined in some of the cases to be the unlawful invasion of the possession of another, he being present, violently or with a strong hand. The high-handed manner of the invasion may be by a multitude of people, or with weapons. The force is sufficient if the party in possession must yield to avoid a breach of the peace." Under the facts, as disclosed by the record, we can see no error in the charge, and the assignment of error made by defendants cannot be sustained.

The gist of the offense of forcible trespass is the high-handed invasion of the actual possession of another, he being present forbidding. Title is not involved. The force necessary should be such as is calculated to intimidate or alarm or involve or tend to a breach of the peace. Numbers of three or more are calculated to overawe resistance. *S. v. Fleming,* 194 N. C., 42. The conduct of defendants was more than a civil trespass, the entry, under the statute, can only be "in a peaceable and easy manner," and "not with a strong hand nor with multitude of people." Three or more are a multitude. *S. v. Simpson,* 12 N. C., 504. The courts are open at all times for the redress of actual or supposed grievances. Men cannot take the law in their own hands.

The court below charged the jury, on the question of possession: "The defendants contend that Johnson was not in possession of the land, and they admit they took off the lock and turned the mules out, claiming that Johnson was not in possession of the land. So it is a question for you to say."

Defendants' witness, Norris, the landlord, under whom Clifton Earp claimed the possession, testified: "Jim Johnson farmed with me for two years, 1926 and 1927. I only had a cow. I had no stock of my own except a cow. I furnished him stables at my house to keep the mules in and a barn to keep the feed in."

On this testimony the prosecuting witness had actual possession of the stables. The charge, perhaps, was too favorable to defendants. We find in law

No error.

W. H. CARROLL v. LEVY BATSON ET AL.

(Filed 17 October, 1928.)

1. **Deeds and Conveyances—Timber Deeds—Construction and Operation—Mortgages.**

   Where a grantor of lands reserves the right to timber thereon for a period of five years with the right of renewal thereof at expiration upon payment of a stipulated amount, and then sells the timber reserved according to this agreement, and the grantee of the lands mortgages the same, and the mortgage is foreclosed: *Held*, the purchaser at the foreclosure sale acquires title to the land, and to the timber thereon subject to the timber deed, and when no tender of the stipulated amount for renewal is made before the expiration of the five years he may enjoin further cutting of timber by the grantee in the timber deed.

2. **Trial—Taking Case or Question from the Jury—Nonsuit.**

   Where the evidence is conflicting as to whether the price for an extension of time for the cutting and removing timber from lands under the provisions of a timber deed has been tendered and issue is raised for the determination of the jury, a motion as of nonsuit thereon will be denied.

CIVIL ACTION, before *Harris, J.*, at March Term, 1928, of SAMPSON.

The evidence tended to show that on 13 January, 1920, Ben W. Southerland and wife conveyed to I. L. Tilton and wife by deed recorded 16 January, 1920, 303 acres of land. Said deed contained the following reservations: "The party of the first part reserves the right to all timber eight inches in diameter and up on the above tract for a period of five years from date, with the privilege of extending said right three years by paying said party of the second part "$100 per year." Tilton and wife executed and delivered to Southerland a mortgage deed upon the land of even date and duly recorded, securing four purchase-money notes of $1,750 each. The mortgage deed made no reference to the timber reserved in the deed. On 12 October, 1923, Southerland and wife conveyed the timber upon said land to defendants, Batson and Hopkins. The timber deed to Batson and Hopkins referred to the deed to Tilton for the land and the reservations therein, and further recited: "It is understood that the said parties of the second part are to have five years to remove said timber," etc. Batson and Hopkins executed a mortgage deed to Southerland to secure the purchase money. The defendant Dennis bought the interest of Hopkins in the timber. Southerland transferred the Tilton notes to the Atlantic Bank and Trust Company. On 13 November, 1923, the Atlantic Bank and Trust Company instituted a foreclosure suit against Southerland and Tilton and wife. In the foreclosure suit it was adjudged "that the equity of redemption of said defendants in and to the land described above be, and the same is hereby foreclosed and barred, and said lands are hereby condemned to be sold and the proceeds thereof applied in payment upon the indebtedness of defendant." It was further adjudged that W. R. Allen be appointed commissioner of the court and directed to sell the land on 18 February, 1924, pursuant to the judgment, which sale was made on 21 November, 1924. Allen, commissioner, executed and delivered to the plaintiff, Carroll, a deed for the land formerly owned by Tilton. The commissioner's deed recites that Ben W. Southerland became the last and highest bidder for the land and that the sale was confirmed. But it further appears that since confirmation Southerland with the approval of the court transferred his bid to Carroll, and the court directed the commissioner to execute and deliver the deed for said land to Carroll. It would therefore seem that Southerland was not considered by the court as the purchaser of the land, but that Carroll, the plaintiff, was the actual purchaser. An injunction restraining the defendants from cutting timber on the land had been issued and continued to the hearing. The plaintiff contended that the extension money had not been tendered to him for the privilege of cutting on or before 13 January, 1925. The defendants offered evidence to the contrary. At the close of the evidence the defendants moved for judgment as of nonsuit and for dissolving the restraining order.

The trial judge decreed: "It is thereupon considered, ordered and adjudged that the plaintiff take nothing by his said action; that the defendants, Batson and Dennis, are the owners of the timber described in the pleadings herein and have the right to renew the same at any time until 1 February, 1931, same being the time granted to them after allowing the time which has elapsed during the pendency of this action when they were prevented from exercising said right." It was further adjudged that the injunction be dissolved and the plaintiff taxed with the cost.

From said judgment the plaintiff appealed.

Faircloth & Fisher for plaintiff.
Richard L. Herring and R. D. Johnson for defendants.

BROGDEN, J. What interest does the grantee of land have in timber reserved therefrom in the deed of the grantor?

This question was considered by the Court in *Mining Co. v. Cotton Mills,* 143 N. C., 307, 55 S. E., 700. The law is thus stated where the land was conveyed in fee with an exception or reservation of the timber: "In such case, if a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or expiration of the time. . . . Whether the right to cut timber is a grant, or a reservation, it expires at the time specified. When no time is specified a grantee of such right takes upon the implied agreement to cut and remove within a reasonable time. He has bought the timber for that purpose, whereas when a grantor of the fee reserves or excepts the timber, he is not providing for timber-cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee giving notice for a reasonable time so that the grantor may elect to cut or sell this right to another."

Again in *Hornthal v. Howcott,* 154 N. C., 228, 70 S. E., 171, the owner of the land sold the timber with the right to cut and remove the same within four years. Thereafter he sold the land by deed reciting the reservation of the timber. It was held that the grantee of the land was the owner of all the timber not cut within the time stipulated. It has been further held that notice that an extension privilege would be exercised must be given to the grantee of the land. *Bateman v. Lumber Co.,* 154 N. C., 248, 70 S. E., 474; *Kelly v. Lumber Co.,* 157 N. C., 175, 72 S. E., 957; *Powell v. Lumber Co.,* 163 N. C., 36, 79 S. E., 272.

In *Shannonhouse v. McMullan,* 168 N. C., 239, 84 S. E., 259, the Court said: "Applying these principles, if the timber should not be cut in five years it would then belong absolutely to the defendants as purchasers of the land, and they could cut it when they wished to do so. In other words, when the defendants bought the land they also bought the right to extend the time for cutting, and the latter was merged in the title to the land, and therefore no interest can become due."

It is clear, therefore that, under the decisions applicable, Tilton as purchaser of the land from Southerland acquired title to all the timber reserved by the grantor Southerland at the expiration of the reservation contained in the deed. In other words, at the expiration of the reservation the timber followed the land and became a part thereof. Hence the timber deed to Batson and Hopkins could not enlarge the right of the grantor Southerland to the reserved timber nor impair the interest of

Tilton, the owner of the land. The execution and delivery of the purchase-money mortgage on the land by Tilton to Southerland did not have the effect of enlarging the right of Southerland or his interest in the timber. "The legal title to property, whether real or personal, conveyed by a mortgage deed, passes to and vests in the mortgagee, who holds the same, however, only for purposes of security. The equitable or beneficial title remains in the mortgagor, who, as to all persons except the mortgagee, is considered the true owner of the property. With respect to the property conveyed to him as security, the mortgagee has such rights only as are required for the protection of his security, and it is for this reason that he is considered as the holder of the legal title." *Bank v. Lumber Co.*, 193 N. C., 757, 138 S. E., 125.

Under the foreclosure proceeding and the deed from Allen, commissioner, pursuant thereto, Carroll, the plaintiff, became the purchaser of the land. The manifest effect of the foreclosure proceeding was to divest Tilton of title to the land by barring and destroying his equity of redemption. The plaintiff, Carroll, as purchaser of the land at the foreclosure sale, succeeded to the right of Tilton. As heretofore pointed out, Tilton was entitled to all timber not cut within five years or during the extension privilege specified in the deed from Southerland to him. The deed provided that the extension privilege was dependent upon payment to Tilton of the sum of "$100 per year." Carroll, the purchaser of the land at the sale, testified that no extension money had been tendered or paid to him on or before 13 January, 1925, when the original five-year reservation period expired. The defendants offered evidence to the contrary. Therefore an issue of fact is sharply drawn and such issue must be determined by a jury.

Reversed.

STATE OF NORTH CAROLINA ON THE RELATION OF STACEY W. WADE, INSURANCE COMMISSIONER, v. MUTUAL BUILDING AND LOAN ASSOCIATION.

(Filed 17 October, 1928.)

Receivers—Allowance and Payment of Claims—Claims for Breach of Insolvent's Executory Contract—Corporations.

Upon the appointment of a receiver by a court of competent jurisdiction for any cause, executory contracts of employment of a corporation are thereby invalidated during the receivership, performance being made impossible by operation of law, and damages may not be recovered for its breach.

APPEAL by John G. Bikle, claimant, from judgment of *Cranmer, J.*, at April Term, 1928, of WAKE. Affirmed.

This action was begun on 13 August, 1927. Upon the allegations of the complaint, which was duly verified, the relator, as Insurance Commissioner of North Carolina, prayed judgment (1) that defendant, its officers and agents be enjoined from further proceeding with its business, and from interfering in any way with the assets and property of defendant, except to account for the same, and (2) that a receiver of said defendant be appointed to take possession of all its assets and property, to the end that the same may be administered to the best interest of the creditors and shareholders of defendant association.

Upon a hearing duly had on 13 August, 1927, without objection on the part of the defendant, it was ordered, adjudged and decreed by the court "that said Mutual Building and Loan Association, its agents, officers and employees be and they are hereby enjoined from carrying on any further business, and from interfering in any way with the assets and property of said association, except to account for and turn over the same to the temporary receiver herein appointed."

In said order a temporary receiver of defendant, Mutual Building and Loan Association, was appointed. The said temporary receiver at once qualified and took into his possession all the assets and property of defendant, and thereafter duly accounted for same to the permanent receiver, who was appointed at a hearing, had upon an order to show cause to the contrary, on 5 September, 1927. The said permanent receiver, since its appointment and qualification, has been and is now engaged in the administration of the assets and property of defendant association, under the orders of the court, and as therein directed. The defendant association ceased to do business prior to 15 August, 1927.

On 21 March, 1928, within the time allowed for filing claims, John G. Bikle filed with the permanent receiver his claim against defendant association. This claim was for damages resulting from a breach of contract by defendant, by which said defendant had employed the said John G. Bikle as its secretary, at an annual salary of $4,000, to begin on 15 August, 1927, and to continue for one year thereafter. Claimant alleges that on 15 August, 1927, he was ready, willing and able to perform his contract with defendant, but that defendant has breached its contract with him by failure to perform the same. He claims as damages for such breach the amount agreed upon as his salary, less such sums as he has been able to earn since the date of the breach, to wit, 15 August, 1927, and less such sums as he shall be able to earn during the year which will expire on 15 August, 1928.

The claim was disallowed by the permanent receiver. Claimant thereupon filed exceptions to the action of the said receiver, and appealed to the judge of the Superior Court, assigning as error the refusal of the receiver, upon the facts which the evidence tended to show, to allow his claim.

From judgment approving the action of the permanent receiver with respect to said claim, and affirming its order, disallowing the same, John G. Bikle, as claimant, appealed to the Supreme Court.

Manning & Manning for claimant.
C. A. Gosney and Murray Allen for the receiver.

CONNOR, J. The decisions of the courts of the several States upon the question presented by this appeal are not uniform. There is sharp conflict in judicial opinion as to the effect of a receivership upon the right of an officer, agent, or employee of a corporation, for which a receiver has been appointed, to recover anticipatory damages for the breach of an executory contract, by which the corporation, prior to the receivership has agreed to pay to its officer, agent or employee a salary, or compensation for services to be rendered to the corporation subsequent to the date on which the receiver was appointed.

In 14 A, C. J., on page 980, it is said: "The question of whether an executory contract is discharged by the appointment of the receiver is one as to which there has been some differences of opinion, some courts taking the position that the contract is discharged, because rendered impossible of performance by act of the law, while other courts take a contrary position, although the claim for damages arising from the breach will constitute a debt of the corporation as distinguished from a debt of the receivership. It is obvious that the subject-matter of the contract is of importance in determining the question, and for that reason in analogy to the rule terminating contracts for personal service as between individuals upon the death of a party, contracts by the corporation for services are, according to the weight of authority, discharged by the appointment of a receiver, or in any event the right to compensation is suspended pending the receivership. There is, however, some authority to the effect that claims for damages arising from breach of contract for services occasioned by the insolvency of the defendant corporation are entitled to be paid pro rata out of funds in the hands of the receiver."

It may be conceded that decisions favorable to officers, agents or employees of a corporation for which a receiver has been appointed by a court of competent jurisdiction, and which for that reason has breached its contract to pay for services which such officers, agents or employees are ready, willing and able to render, pursuant to contracts of employment, subsequent to the receivership, find much support on principle.

However, we have a decision of this Court, which we think authoritative and therefore controlling in this jurisdiction. In *Lenoir v. Improvement Co.,* 126 N. C., 922, 36 S. E., 185, it is held that the appointment of a receiver for a corporation, who is directed to take control of all the property of the corporation, and to assume entire management of its affairs, has the effect of suspending all officers of the corporation; they cannot thereafter interfere with the business of the corporation and are entitled to no salaries during the continuation of the receivership. In the opinion in that case, written by *Douglass, J.,* for the Court, it is said: "We frankly admit that this case has given us much trouble, and to it we have given careful consideration. The authorities on the exact point are not numerous, but they are conflicting, and from courts of the highest respectability."

The decision of the question presented in *Lenoir v. Improvement Co., supra,* was made after a careful review of the authorities in other jurisdictions, and after full citations from opinions written in support of conflicting decisions of other courts. The principle approved and applied by this Court in rendering its decision, is that performance by a corporation of an executory contract to pay for services to be rendered by its officers, agents or employees, pursuant to contracts of employment, subsequent to the appointment of a receiver for the corporation, becomes impossible as the result of an act of the law, and that therefore the contract is discharged. By the appointment of a receiver, who is authorized and directed to take control of all the property of the corporation and to assume the entire management of its affairs, both the corporation and its officers, agents and employees are discharged from their mutual obligations arising out of the contract of employment. The contracts of employment, by which its officers, agents or employees undertake to render service to the corporation are made subject to this principle.

As this is the controlling principle upon which the question presented by this appeal is to be decided, it is immaterial whether the corporation for which the receiver is appointed is insolvent or not, or whether the receiver was appointed because of mismanagement of the corporation by its directors or because of conditions for which the directors cannot be held responsible. The principle is applicable where the receiver has been appointed by a court of competent jurisdiction upon any valid grounds. In the instant case, the claimant does not challenge the validity of the order of the court appointing the receiver; indeed, he makes no objection to the receivership, but by filing his claim acquiesces in the appointment.

Upon the authority of *Lenoir v. Improvement Co., supra,* the judgment must be

Affirmed.

R. W. PERRY v. KELFORD COCA-COLA BOTTLING COMPANY.

(Filed 17 October, 1928.)

1. **Food—Liability of Manufacturer for Injury to Consumer—Deleterious and Foreign Substances—Negligence—Res Ipsa Loquitur.**

An action against a bottling company for damages caused by foreign and deleterious substances contained in the drink sold is one for negligence, and the doctrine of *res ipsa loquitur* does not apply upon the finding of such foreign substances, but negligence need not be proved directly, but may be inferred by relevant acts and circumstances.

2. **Same—Evidence.**

When the plaintiff has offered evidence tending to show that a bottle of coca-cola purchased by him contained shivered glass which caused him injury, it is competent for him to introduce evidence that other bottles of coca-cola sold to others, bottled by the defendant about the same time, contained foreign and deleterious substances, as evidence tending to show defendant's actionable negligence.

CIVIL ACTION for damages, before *Townsend, Special Judge,* at January Special Term, 1928, of HERTFORD.

Plaintiff offered evidence tending to show that in January, 1927, he bought a bottle of coca-cola from Jenkins & Son. Plaintiff testified as follows: "When Jenkins handed me the bottle I began to drink it down and felt something kind of cutting. I kept chewing, but it didn't crush. I thought it was ice. I drank several fine shivers, and there was a piece so large I tried to get it down. I had so much in my mouth that I spit it out. I told Jenkins that there was glass in there. We got down on our knees and looked. He said it was glass and he said the bottle was not broken. I examined it. There is the same in the bottle as it was then, except what I drank." The evidence further tended to show that there was "a good deal" of glass in the bottle, "and it looked like enough to kill anybody." The bottle was purchased by the seller from the defendant and had been in a crate in the seller's store for two or three days. The seller testified that when he took the bottle from the crate and opened it that he inspected it to see if it was broken around the top, and, finding no defect, handed the bottle to the plaintiff. The seller further testified that the bottle had been in his store right where "he had put it." The seller also testified without objection: "We found a stick in one bottle bought from this company. We examine every bottle to see if they are broken." Witness was asked: "Have you ever seen any other bottles bought by you of the Kelford Coca-Cola Bottling Company that had any foreign substance in it?" The defendant objected, and the objection was sustained. Thereupon the plaintiff tendered other witnesses who would have testified that they each had found foreign substances in bottled coca-cola put up by defendant company some time "about the time" plaintiff claimed to have been injured.

This testimony was excluded by the court.

Five issues were submitted to the jury, the first being, "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" The jury answered this issue no, and did not answer any other issues.

The defendant tendered judgment upon the verdict. The trial judge refused to sign the judgment, and as a matter of law and not as a matter of discretion, set aside the verdict because he was of the opinion that he had committed error in declining to admit evidence tendered by the plaintiff tending to show foreign substances found in other bottles sold by the defendant "at about the time" the plaintiff was injured.

From the order of the trial judge awarding a new trial, the defendant appealed.

W. W. Rogers and Stanley Winborne for plaintiff.
Winston, Matthews & Kenny for defendant.

Brogden, J. The question of law is this: Upon the trial of an action for damages for personal injury caused by shivered glass in a bottle of coca-cola, is it competent upon the question of negligence to show that foreign substances were found in other bottles of beverage bottled and sold by the defendant "at about the same time" plaintiff was injured?

The rule of law governing the liability of the manufacturer of foods and beverages to a consumer, for injury occasioned by deleterious and harmful substance contained in such beverage, is clearly stated in *Crigger v. Coca-Cola Bottling Co.*, 179 S. W., 155. The Supreme Court of Tennessee in that case said: "From a careful consideration of the subject, and after mature thought, we are of the opinion as follows: 1. That one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to any one injured for a failure to properly safeguard and perform that duty. 2. This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure food, beverages and medicines, we believe with *Cooley, J.*, as expressed in *Brown v. Marshall, supra,* that negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury without some negligent act or omission." The authorities upon the subject are contained in the following cases: *Davis v. Van Camp Packing Co.,* 176 N. W., 382, 17 A. L. R., 649; *Birmingham Chero-Cola Bottling Co. v. Clark,* 89 Southern, 64, 17 A. L. R., 667; *Windram Mfg. Co. v. Boston Blacking Co.,* 131 N. E., 454; 17 A. L. R., 669; *Dail v. Taylor,* 151 N. C., 284, 65 S. E., 1101, 66 S. E., 135; *Ward v. Sea Food Co.,* 171 N. C., 33; 87 S. E., 958; *Cashwell v. Bottling Co.,* 174 N. C., 324, 93 S. E., 901; *Grant v. Bottling Co.,* 176 N. C., 256, 97 S. E., 27; *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; *Gill v. Lunch System,* 194 N. C., 803, 139 S. E., 925.

As the cause of action is ordinarily based upon negligence, how can the negligent act or omission establishing liability be proved? It is settled law in this jurisdiction that the principle of *res ipsa loquitur* does not apply to personal injury occasioned by bursting bottles or from eating food alleged to be unwholesome, or for partaking of a bottled beverage when there is no evidence tending to show negligence in the preparation of the food or beverage and no deleterious or harmful substance is found therein. *Dail v. Taylor; Cashwell v. Bottling Co.; Lamb v. Boyles.* However, negligence may be inferred from relevant and pertinent acts and circumstances. Thus, in *Fitzgerald v. R. R.,* 141 N. C., 530, 57 S. E., 219, it was held that: "Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence."

The evidence offered by the defendant in the case at bar tended to show that the defendant operates a modern and up-to-date plant, but the plaintiff attempted to show that the defendant had placed upon the market "at about the time plaintiff was injured" bottles of coca-cola that contained foreign substances. This was a relevant circumstance upon the issue of negligence to be considered by the jury together with all the other evidence in the case. In both the *Dail* and *Cashwell cases,* involving injury from the explosion of a bottle, this Court held that it was competent to show the explosion of other bottles, placed upon the market by the defendant, upon the question of negligence, and no sound reason occurs to us why the plaintiff should not be entitled to show as a circumstance to be considered by the jury that other bottles of the beverage manufactured and sold by the defendant "at about the same time" plaintiff was injured, contained harmful substances.

In *Lamb v. Boyles, supra,* "the testimony offered by the plaintiff as to other alleged acts of negligence on the part of the defendant was held not to be admissible as substantive evidence on the first issue and as such it was accordingly excluded." It will be observed, however, that there was no evidence of any foreign matter contained in the ale which the plaintiff drank. Negligence is not presumed from the fact of injury alone in such cases, and as it appeared in that case that no deleterious or harmful ingredient or substance was found in the beverage it followed as a logical conclusion that negligence could not be inferred in the absence of such proof. The fact that other bottles might have contained harmful substances was obviously no proof that the bottle furnished to the plaintiff contained any harmful or injurious substance.

Affirmed.

IRENE STREET, ADMINISTRATRIX, v. ERSKINE-RAMSEY COAL COMPANY.

(Filed 17 October, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Method of Work—Evidence.**

In an action to recover damages for the negligent killing of plaintiff's intestate in the repairing of an "air course" in a coal mine, where there is evidence that the deceased met his death by a rock falling upon him from the top of the course, while working under the direction of the defendant's superintendent in an unprotected place, evidence is competent that it was the general and approved custom in such instances to "fore-pole" the work, and had this been done it would have afforded protection to the intestate and the injury would not have occurred.

2. **Evidence—Expert Testimony—Subjects of Expert Testimony.**

In this case: *Held*, evidence of one speaking from his own knowledge and experience that "fore-poling" the work on an "air course" would have prevented the injury to the plaintiff's intestate, was not objectionable as a nonexpert opinion upon the facts of this case, or as testifying upon the issue as within the exclusive province of the jury to decide.

3. **Negligence—Acts and Omissions Constituting Negligence—Anticipating Injury.**

In an action against the master for the negligent killing of plaintiff's intestate, an employee, it is not necessary that the particular injury resulting in the death could reasonably have been foreseen, if it is made to appear by the evidence that some injury would be likely to flow from the tort in suit.

4. **Master and Servant—Liability of Master for Injuries to Servant—Assumption of Risk.**

In order for an employee to be barred of recovery by assuming the risk of a dangerous service, the danger must be so obvious and so imminent that a man of ordinary prudence would not have continued to work under the conditions shown to have existed.

5. Trial—Reception of Evidence—Objections and Exceptions.

Error of the trial court in admitting evidence may be cured by the later admission of the same evidence without objection.

APPEAL by defendant from *Nunn, J.*, and a jury, at March Term, 1928, of CHATHAM. No error.

The plaintiff was duly appointed and qualified as administratrix of her husband, Herbert Street. This action is for actionable negligence. The plaintiff alleges that her intestate was killed through the negligence of defendant while working in its coal mine near Gulf, N. C.

The complaint alleges in part: "That the plaintiff's intestate was, a day or so previous to his injury and death, working for the defendant in the main air way, loading coal on cars which were operated in its mine, which was the regular position occupied by the plaintiff's intestate; but on the date aforementioned the plaintiff's intestate was ordered to leave his regular position and to perform the duties aforesaid, under the immediate supervision and control of the said W. H. Hill, and not knowing at the time of entering upon said duties in said air course that it was in a dangerous, nor was he, prior to the performance of such duties, advised of its dangerous condition, but was required to work, by the said W. H. Hill, at a place which was unsafe for him and the other employees working at said place in said 'air course,' in all of said acts the defendant was negligent, and its said negligence was the proximate cause of the injury and death of the plaintiff's intestate. That the defendant was further negligent in that it failed and neglected to erect or construct a covering over the place where plaintiff's intestate was required to work, to prevent rock and dirt from falling upon him while in the performance of his duties, in which act aforesaid, the defendant was negligent, and its said negligence was the proximate cause of the injury and death of the plaintiff's intestate."

Defendant denied that it was guilty of any negligence, and set up the plea of assumption of risk and contributory negligence.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff's intestate voluntarily assume the risk and danger of his employment as alleged in the answer? Answer: No.

"3. Did the plaintiff's intestate by his own negligence contribute to his injury and death, as alleged in the answer? Answer: No.

"4. What damage, if any, is the plaintiff entitled to recover of the defendant for the injury and death of the plaintiff's intestate? Answer: $3,500."

The defendant made numerous exceptions to certain evidence introduced by plaintiff, and assigned errors. The material ones and facts bearing on same will be considered in the opinion.

Upon conclusion of plaintiff's evidence, the defendant moved for judgment as in case of nonsuit. C. S., 567. The motion was overruled, defendant excepted, assigned error and appealed to the Supreme Court.

W. P. Horton and D. L. Bell for plaintiff.
Seawell & McPherson for defendant.

CLARKSON, J. The charge of the court below is not in the record. The presumption is that the court below charged the law applicable to the facts on all the issues. The plaintiff's intestate, Herbert Street, was an employee in defendant's coal mine at Gulf, in Chatham County, N. C. He had worked in the coal mine about eight years before he was killed about 14 August, 1927. He was struck while working in the coal mine in the head by a falling rock the size of a man's hat, which broke into several pieces when it struck him, fracturing his skull. He was struck about 3 o'clock on Saturday and died Sunday evening following at 4 o'clock.

The plaintiff's intestate was working under the direction of W. H. Hill, superintendent of defendant's coal mine, who was his boss. In working in the tunnels in the coal mine underground, it was necessary to have an *air course.* The air course was thirteen feet wide. There was a break in it overhead, and it was being repaired. Plaintiff's intestate was working fixing the brace, aiding in timbering and putting up the framework under Hill's direction. There was nothing overhead to protect him from anything that might fall from the top. The *air course* had fallen in, plaintiff's intestate was helping to get it opened up so ventilation would come through.

Defendant complains and assigns error to the following questions and answers of Fisher Holmes, witness for plaintiff, who testified, in part, as follows: "I have been in the mine work for eighteen years. Half the time on work of the character Herbert Street was doing in the Erskine-Ramsey Mine when injured. In West Virginia, East Virginia and North Carolina. There was a falling in from overhead; they were loading traffic that was falling in and timbering up; setting legs on the side and putting collars across. *Q. What is the general and approved method of that kind of work? Q. What is the customary way? A. In most of the places where I have been doing this kind of work we use a structure of fore-poling, or rat-tailing.* The timber would be set erect over the hole—the framework. The timber must be set as much as four or six feet ahead over the timbers for protection over you under here making the second brace. You pole ahead if you want to continue. That is for protection until you erect another column. We erect timber legs on each side of the wall and set out timber across the fore-pole across four feet ahead and six feet ahead for the particular purpose of erecting another column for protection. This fore-poling is close, like that, right over your head, and then you can erect another column under the fore-pole across like that, extended over. This notifies you of rock and dirt. It would not be sufficient as to save a man, but it would notify and protect in that way. You can hear the dropping and get back. Different sizes of timbers are used. Whether you can put a sufficient amount of timber in to protect against rock and dirt which might fall from above depends on how large it is. I have seen rocks fall from above as big as this desk, or larger than those tables. *Q. How about a rock as big as your hat? A. Well, you could fore-pole enough, I think, to protect that.*"

As to the first question and answer: The general principle is well settled in this jurisdiction, as laid down in *Hicks v. Mfg. Co.,* 138 N. C., at pp. 325-6: "It is accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employees, in the exercise of proper care, a reasonably safe place to work and to supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Witsell v. R. R.,* 120 N. C., 557; *Marks v. Cotton Mills,* 135 N. C., 287." *Steeley v. Lumber Co.,* 165 N. C., 27; *Orr v. Rumbough,* 172 N. C., 754; *Lynch v. Dewey,* 175 N. C., 152; *Thompson v. Oil Co.,* 177 N. C., 279; *Beal v. Coal Co.,* 186 N. C., 754; *Thomas v. Lawrence,* 189 N. C., 521; *Robinson v. Ivey,* 193 N. C., 812; *Ledford v. Power Co.,* 194 N. C., 98; *Smith v. Ritch, ante,* 72.

Seaboard & L. R. Co. v. Horton, 233 U. S., at p. 501, reversing this Court (162 N. C., 424), it is said: "The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen."

It is the duty of the employer, in the exercise of ordinary care, to furnish an employee with a reasonably safe place to work. This is especially so where the place is more or less dangerous. The employer is not an insurer of the employee's safety. Before directing an employee to work in a place of more or less danger, it is the duty of the employer to use due care to see that the place is reasonably safe for the employee to perform his work. To do this, it is the duty of the employer to use such means and methods that are approved and in general use at a place of like kind and character.

The witness, Fisher Holmes, was recalled by plaintiff and, without objection, testified as follows: "I went off the shift just before Herbert Street came on when he was hurt. I worked at the same place where Herbert Street was hurt—just before he was hurt. I am familiar with the work that was being done, and the conditions in which it was being done. *The generally used and approved method of work is fore-poling. It was practical to fore-pole the work where Herbert was injured. This would have made it safe.*"

McKinley Street, a witness for plaintiff, testified, without objection: "I have worked in the mine about seven years. In the Ramsey Mine, and in Virginia and West Virginia. I have had a little bit of experience in repairing air courses and overhead work—not very much. *At the time that Herbert was fixing the brace there was nothing overhead to protect him from anything that might fall from the top.* Foster Horton and Mr. Hill were there. Mr. Hill was superintendent of the mine at that time. He gave instructions to Herbert and me as to where to work and what we were to do. He was also Herbert's boss. Q. At the time Herbert was hurt from falling rock, did you know whether he was doing what he had been told to do by Mr. Hill? A. Yes, sir. He was doing what he had been told to do." Recalled: "Q. Was there anything said by Mr. Hill about there being any danger in doing that work? A. No, sir, I do not know what Mr. Hill said to Herbert Street about danger; he said nothing to me, and I did not hear him say anything to Herbert about the place or its dangerous condition. Q. Were you close together? A. Yes, sir, about as far as over that table. Four or five feet from him. Herbert's character and reputation for thrift, industry and work were good."

Foster Horton, a witness for plaintiff, testified, without objection: "At the time Herbert Street was hurt we were timbering, putting up framework where we were working. *There was nothing overhead to prevent anything from falling.* The air course had fallen in and we were trying to open it up, get it opened up so ventilation would come through. . . . I was with Herbert Street when he was hurt. *I am familiar with the method of fore-poling work of this kind. It was practical to have fore-poled this work* where Herbert Street was injured. (Recross) They did fore-poling in this mine before. That is the only way they ever did work of this kind. I do not know how many times

I have done work like this. *They were not fore-poling it this time, and that is the only safe way to do it.* I have never worked in any other mine."

We do not think the assignment of error can be sustained. The objection was cured by testimony, unobjected to, that "The generally used and approved method of work of this kind is fore-poling."

As to the other assignment of error: The witness Holmes was permitted, over objection, to give his opinion that "fore-poling" would have protected the employee against a rock "as big as your hat." We think this cannot be sustained.

"Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge." 22 C. J., p. 530, citing numerous North Carolina cases. *Britt v. R. R.,* 148 N. C., 37; *Kepley v. Kirk,* 191 N. C., at p. 694. Nor did it invade the province of the jury. See *S. v. Carr, ante,* 129.

In any event, it was waived by the evidence unobjected to. "This would have made it safe." "Nothing overhead to protect him from anything that might fall from the top." "That is the only safe way to do it."

Quoting from *Hicks' case, supra,* at pp. 326-7, citing numerous authorities, it is said: "But where there has been no legislation, as in the class of cases we are now considering, it has been declared in this State in several well considered decisions that where such employer of labor has been negligent in failing to supply his employees with appliances, tools, etc., reasonably safe and suitable for the work in which they are engaged and such as are approved and in general use, and such negligence is the proximate cause of the injury to the employee, such injured employee shall not be barred of recovery by the fact that he works on in the presence of a known defect, even though he may be aware to some extent of the increased danger. To have such effect, that is to bring the knowledge of such observed conditions of increased hazard imputable to the master's negligence, into the class of ordinary risks which the employee is said to assume, the danger must be obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would incur the risk which the conditions disclose." *Medford v. Spinning Co.,* 188 N. C., 125; *Crisp v. Thread Mills,* 189 N. C., 89; *Parker v. Mfg. Co.,* 189 N. C., 275; *Holeman v. Shipbuilding Co.,* 192 N. C., 236; *Ogle v. R. R.,* 195 N. C., 795. The matter is fully discussed in *Maulden v. Chair Co., ante,* 122.

In *Jefferson v. Raleigh,* 194 N. C., at p. 482, it is said: "It is not essential that the particular injury could have been foreseen, but that some injury was likely to flow from the method used in performing the work. This principle of liability, first announced in *Drum v. Miller,* 135 N. C., 204, flows through the decisions without a break, but with increasing volume. *Hall v. Rinehart,* 192 N. C., 706."

An interesting article appears in the Industrial Engineering (New York) describing dust masks for workers. It is humanitarian and in part says: "The numerous industries in which workers perform their labor in atmospheres charged with unwholesome and poisonous dusts or gases will be interested in a device developed by the Federal Bureau of Mines, which serves all the purposes of a hat, and at the same time intercepts the dangerous dust particles that would otherwise penetrate the lungs of the wearer. When the device is worn by miners, it should tend to ease the blow of any dislodged piece of rock that might tumble down upon the head of the worker."

We think the court below was correct in overruling defendant's motion for judgment as in case of nonsuit. We find

No error.

W. N. O'NEAL v. WAKE COUNTY, COUNTY BOARD OF EDUCATION, AND STATE INSURANCE DEPARTMENT.

(Filed 17 October, 1928.)

1. **Municipal Corporations—Governmental Powers and Functions in General—Counties.**

A county is a body politic and corporate to exercise as an agent for the State only such powers as are prescribed by statute and those which are necessarily implied therefrom by law, essential to the exercise of the powers specifically conferred. C. S., 1290, 1291, 1297.

2. **Municipal Corporations—Contracts—Counties.**

It is essential that a county to exercise the powers to contract must act through its county commissioners as a body convened in legal session, regularly adjourned or special, and, as a rule, authorized meetings are prerequisite to corporate action, which should be based upon deliberate conference and intelligent discussion of proposed measures.

3. **Same.**

The commissioners of a county are without authority, constitutional or statutory, to enter into a joint meeting with other State governmental agencies functioning as entirely separate departments respectively of the county and the State, and therein make a binding corporate contract by the adoption of a joint verbal agreement to pledge the faith and credit of the county for its part in the payment for the employment of a person to render service in the capacity of a detective to determine and procure evidence against those who have committed a criminal offense.

4. Same.

Where the period of employment under an alleged valid contract of the county is left indefinite, the presumption is that the time thereof is to be reasonable, and a period of six years, extending beyond the time for which the members have been elected to their office, is held to be unreasonable, and not within the contemplation of the county commissioners who are alleged to have made the contract in behalf of the county as its corporate obligation.

5. State—Claims against the State—Consent to be Sued—Obligations of Contract.

The withdrawal by statute of the right of the Insurance Commissioner to use certain funds, derived by license tax, for the investigation of fires does not impair a vested right prohibited by the Constitution, and thereafter a suit by a citizen under a contract made for that purpose is a suit against the State without authority or consent of the State, and cannot be maintained in the Superior Court. Const., Art. IV, sec. 9.

6. Insurance — Control and Regulation — Insurance Commissioner — Statutes.

Where a section of a revenue act allowing the Insurance Commissioner the use of a portion of the insurance license tax in the prevention of fires is omitted from a later act, and the collection of such tax is transferred to the Revenue Department, the effect is the withdrawal of this power from the Insurance Commissioner.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1928, of WAKE.

Suit to recover damages for alleged breach of contract. The plaintiff alleges that in the early part of 1921 an outbreak of lawlessness occurred in New Light Township, resulting in the burning of a church and several residences and schoolhouses, and that on 9 May, 1921, the defendants held a joint meeting in the courthouse in Wake County in which "it was agreed to ask the plaintiff to obtain evidence against the parties guilty of said burnings," and that one-third of the plaintiff's "salary" should be paid by Wake County, one-third by the County Board of Education of Wake County, and one-third by the Insurance Department of the State of North Carolina. He alleges that the defendants agreed to make no record of their action, and that on 3 June, 1927, the contract was acknowledged in the following paper:

"STATE OF NORTH CAROLINA—WAKE COUNTY.

This is to certify that we, the undersigned, did, in May, 1921, duly appoint W. N. O'Neal to act as special detective in obtaining evidence against the party or parties connected with the burning of Sears' Schoolhouse, Story Hill Schoolhouse and West Grove Church, and Sunrise Library, and that we would pay said O'Neal a fair salary for his services. It was understood at the time of the appointment that no record of the appointment should be made, as this might hinder the work as detective. It was also understood that the board of education would pay one-third of the salary allowed said O'Neal, the county commissioners one-third, and Mr. Stacey Wade, in behalf of the State, one-third.

This 3 June, 1927.

N. Y. Gulley,
M. B. Chamblee,
R. P. Jones,
O. L. Ray, M.D.,
E. T. Scarborough,
H. D. Rand,
Stacey W. Wade,
Insurance Commissioner.

Witness: W. J. Simpson, J.P., to all names
except the first and last ones."

It is further alleged that for six years the plaintiff gave his time to the performance of his agreement; that the guilty parties were convicted, and that he is entitled to recover for his services the sum of $9,000.

The county board of education filed an answer and the other defendants demurred to the complaint. The demurrers were sustained and the plaintiff excepted and appealed.

Mills & Mills for plaintiff.

Leroy L. Massey for Wake County.

Attorney-General Brummitt and Assistant Attorney-General Nash for Insurance Department.

Adams, J. The demurrers admit the complaint, but deny its sufficiency in law to constitute a cause of action. *Sandlin v. Wilmington,* 185 N. C., 257.

Wake County demurs on the ground that it is sued in its corporate capacity, and that there is no allegation in the complaint of a corporate contract; or, differently expressed, that the cause of action, if a sufficient cause is alleged, is against individuals and not against the county as a corporate entity.

In North Carolina every county is a body politic and corporate; it may exercise the powers which are prescribed by statute and those which are necessarily implied by law, and no others; and these powers can be exercised only by the board of commissioners or in pursuance of a resolution which it adopts. C. S., 1290, 1291, 1297; *Dare v. Currituck,* 95

N. C., 189; *Manuel v. Comrs.,* 98 N. C., 9. The implied powers are such as are necessarily or reasonably implied from those expressly granted or such as are essential to the exercise of those which are expressly conferred.

A county makes its contracts through the agency of its board of commissioners; but to make a contract which shall be binding upon the county the board must act as a body convened in legal session, regular, adjourned, or special. A contract made by members composing the board when acting in their individual and not in their corporate capacity while assembled in a lawful meeting is not the contract of the county. As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference and intelligent discussion of proposed measures. 7 R. C. L., 941; 15 C. J., 460; 43 C. J., 497; *P. & F. R. Ry. Co. v. Comrs. of Anderson County,* 16 Kan., 302; *Kirkland v. State,* 86 Fla., 84. The principle applies to corporations generally, and by the express terms of our statute, as stated above, every county is a corporate body. C. S., 1290; *Duke v. Markham,* 105 N. C., 131; *Hill v. R. R.,* 143 N. C., 539; *Everett v. Staton,* 192 N. C., 216.

It is alleged in the complaint that the contract on which the plaintiff relies was made at a joint meeting of the defendants and, notwithstanding the direction given in C. S., 1309, that no record of the proceedings was kept. Counties exercise only such general supervision and control of county affairs as may be prescribed by law. Const., Art. VII, sec. 2. We find no constitutional or statutory provision which authorizes or empowers a board of county commissioners to enter into a joint meeting with other agencies functioning as entirely separate departments respectively of the county and the State, and thereby to make a binding corporate contract by the adoption of a joint verbal agreement to pledge the faith and credit of the county.

There is another point. The duration of the alleged agreement is indefinite. The proposed remuneration is referred to in the complaint as a salary; and although no time was suggested within which the services should be performed, or for how many years the "salary" should be paid, the plaintiff, after the lapse of six years, says that he is entitled to nine thousand dollars. Whether the board of commissioners had the legal right to make a contract of this kind potentially operating beyond their term of office and into the term of a succeeding board is a question involving serious doubt. The rule as to such contracts is not inflexible, but the prevailing opinion seems to be that the members of the board of county commissioners cannot contract in reference to matters which are personal to their successors. *Picket Pub. Co. v. County Commissioners,* 12 Anno. Cas., 986, note; 29 L. R. A. (N. S.), 656, note. When the time of performance is indefinite, the contract may mean that performance is to be continued for a reasonable time, or that the time was left indefinite with the expectation that the parties might continue performance as long as they pleased, or that they would subsequently settle that term of the promise. 1 Williston on Contracts, sec. 38. In the last two contingencies the matter would be personal to a succeeding board. But at any rate, it was manifestly not within the contemplation of the parties that the alleged contract should continue in effect for a long term of years. Our conclusion is that the agreement was not enforceable against the county of Wake, and for this reason that there was no error in sustaining its demurrer.

The demurrer of the Insurance Department presents other questions: Whether the action is against the State and, if so, whether the State has given its consent to be sued.

The Eleventh Amendment of the Federal Constitution provides that the judicial power of the United States shall not extend to any suit in law or equity commenced or prosecuted against one State by citizens of another State, or by citizens or subjects of any foreign State. In construing the Amendment the Supreme Court of the United States has said that it did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits, and that a suit against a State by one of its own citizens, the State not having consented to be sued, is unknown to and forbidden by the law, as much so as suits against a State by citizens of another State of the Union, or by citizens or subjects of foreign States. *Hans v. Louisiana,* 134 U. S., 1, 11, 33 Law Ed., 842, 846; *Fitts v. McGhee,* 172 U. S., 516, 624, 43 Law Ed., 535, 540.

In *Carpenter v. R. R.,* 184 N. C., 400, it was said: "The principle is firmly established that a State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, except in cases authorized by Article XI of the Constitution of the United States, or by some provision in the State Constitution represented, for example, by Article IV, section 9, of the Constitution of North Carolina. In *Beers v. Arkansas,* 20 Howard, 527, *Taney, C. J.,* said: 'It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'" *Chemical Co. v. Board of Agriculture,* 111 N. C., 135; *Moody v. State Prison,* 128 N. C., 12.

As the plaintiff's claim against the Insurance Department (C. S., 6263) was in effect a claim against the State the Superior Court had no jurisdiction unless the State had given its consent to be sued; the Supreme Court has original jurisdiction to hear claims against the State and to render recommendatory decisions. Constitution, Art. IV, sec. 9. Had the State given its consent to be sued?

At the time the agreement is said to have been made the Insurance Commissioner was authorized to use the license tax imposed upon fire insurance companies for the purpose of investigating fires and paying certain expenses, including those of detectives and officers. C. S., 6078. The Revenue Act of 1921 provided that so much of the license fees collected from fire insurance companies as were necessary should be used by the Insurance Commissioner for the prevention of fire waste and accidents. Pub. Laws 1921, ch. 34, sec. 67. This section was omitted from the Revenue Act of 1927, and in consequence the Insurance Commissioner could not thereafter expend the license tax for any purpose. Public Laws 1927, ch. 80, sec. 208. Under C. S., 6268, no sum could be used for the purpose indicated without the previous approval of the Governor. Moreover in 1925 the General Assembly established an executive budget system and provided that every State department should operate under an appropriation and that no money should be disbursed from the State Treasury except as provided by the act. Public Laws 1925, ch. 89, secs. 5, 17. At the same session the duties of the Insurance Commissioner with respect to licenses, taxes, etc., were transferred to the Revenue Department (Public Laws 1925, ch. 158, sec. 5), and the appropriation made in 1927 for the fire prevention bureau of the Insurance Department was to be disbursed under the budget system. Public Laws 1927, ch. 79. The plaintiff's action was instituted on 28 December, 1927, and at that time the Insurance Commissioner had no authority to make payment even if the agreement had been valid, and no fund out of which payment could be made. The action, then, was a suit against the State; and if section 6078 should be construed as an implied consent to be sued, the consent was afterwards withdrawn before suit was brought; and withdrawal of consent was not objectionable on the ground that it impaired the obligation of a contract. This is clearly pointed out in *Beers v. Arkansas,* 20 Howard, 527, 15 Law Ed., 991, and in *Smith v. Reeves,* 178 U. S., 436, 44 Law Ed., 1140.

The subsequent certification by the Insurance Commissioner and by members of the board of commissioners and of the county board of education did not validate an agreement which could not originally have been enforced. In sustaining the demurrer of Insurance Department there was no error. The judgment of the Superior Court is

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF THE CORPORATION COMMISSION v. SOUTHERN RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 17 October, 1928.)

1. **Statutes—Construction—Remedial Statutes—Corporation Commission —Railroads.**

   Where a State commission is created with jurisdiction over railroad companies operating within the State, the statute will be construed liberally to effectuate its purposes and to advance the remedy contemplated by the General Assembly.

2. **Railroads—Control and Regulation—Stations—Corporation Commission.**

   Under the provisions of C. S., 1041, 1042, the Corporation Commission of this State has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate.

3. **Corporation Commission—Jurisdiction—Appeal—Superior Courts.**

   The jurisdiction of the Corporation Commission is original, to be exercised either upon its own motion or upon petition of interested parties, and only parties whose property rights may be affected have the right to appeal to the Superior Court, C. S., 1097, and the jurisdiction of that court is derivative.

4. **Courts—Superior Courts—Appeals from Orders of Corporation Commission.**

   The appeal of those who are not parties to the proceedings before the Corporation Commission should be dismissed in the Superior Court for want of jurisdiction.

5. **Same.**

   On appeal from an order of the Corporation Commission to compel railroad companies to submit plans for a new union depot on account of the inadequacy of the existing one, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact arising upon exceptions taken by the appellant during the hearing before the Commission, and the trial as to the facts at issue is *de novo.*

6. **Corporation Commission—Jurisdiction—Railroads.**

   Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Corporation Commission or the Superior Court on appeal that in the proceedings before the Corporation Commission to compel them to build and maintain an adequate station, that the lessor railroad be a party, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein.

APPEAL by defendants from order of *Cranmer, J.*, at Second April Civil Term, 1928, of WAKE. Appeal dismissed.

This proceeding was begun by petition filed with the Corporation Commission of North Carolina, on 15 November, 1926. The petitioners were the City of Raleigh and others; the respondents are Southern Railway Company, Seaboard Air Line Railway Company, and Norfolk Southern Railroad Company. Each of the respondents is engaged in business in North Carolina as a common carrier of passengers and freight. Each enters the city of Raleigh with its railroad. The respondents maintain and use in the conduct of their business as common carriers of passengers, a Union Passenger Station in the city of Raleigh.

It is alleged in the petition in this proceeding that said Union Passenger Station and its facilities are "totally inadequate, unsafe, unsanitary and unsightly." Petitioners pray that respondents be required by order of the Corporation Commission to construct and equip an adequate Union Passenger Station in the city of Raleigh.

After a hearing, upon facts found by the Corporation Commission, from evidence offered by both petitioners and respondents, the following order was made by the Commission on 31 August, 1927:

"It is ordered that the Southern Railway Company, the Seaboard Air Line Railway Company and the Norfolk Southern Railroad Company file with the Corporation Commission within ninety days from this date plans for a new and adequate Union Passenger Station to be erected in the city of Raleigh, upon either of the sites indicated in its findings herein made."

Exceptions to this order were duly filed by the respondents. Thereafter, upon a further hearing of this proceeding, the following order was made by the Corporation Commission on 6 January, 1928:

"It is ordered that the exceptions filed by the respondents in this proceeding be, and they are hereby overruled, and that the order of the Commission of 31 August, 1927, be and it is hereby amended by extending the time fixed therein for the filing of plans and specifications for a new and adequate Union Passenger Station in Raleigh to ninety days from the date of this order."

Each of the respondents appealed from this order to the Superior Court of Wake County, and thereafter filed exceptions to said order in accordance with the provisions of C. S., 1097 *et seq.* The appeal came on for hearing in said Superior Court at Second April Civil Term, 1928, before Cranmer, J., and a jury. At said hearing the petition of the City of Raleigh and others to the Corporation Commission, the answers of the respondents to said petition, and the orders of the Corporation Commission, together with the exceptions and assignments of error based thereon were read to the court and jury.

The court found as a fact, from admissions made at the hearing by counsel for the State of North Carolina on the relation of the Corporation Commission, that the title to the present Union Passenger Station and appurtenant properties in Raleigh, is held, one-third undivided interest therein by the Southern Railway Company, one-third undivided interest therein by the Seaboard Air Line Railway Company, and one-third undivided interest therein by the North Carolina Railroad Company; and that the one-third undivided interest in said Union Passenger Station of the said North Carolina Railroad Company is leased by said company to defendants herein, the Southern Railway Company and the Seaboard Air Line Railway Company. The defendant, Norfolk Southern Railroad, enters the said Union Passenger Station at Raleigh, and uses the same and its facilities under a rental agreement with its co-defendants.

Upon the above findings, defendants moved that this proceeding be dismissed, for want of jurisdiction, in that the North Carolina Railroad Company was a necessary and indispensable party to the proceeding before the Corporation Commission; that in the absence of said North Carolina Railroad Company as a respondent, the Corporation Commission was without jurisdiction of the subject-matter of the petition in this proceeding, which is now in the Superior Court upon appeal, as provided by statute, from the order of said Commission. The motion was denied, and defendants excepted.

Thereupon the following order was made by Judge Cranmer:

"This cause coming on to be heard before his Honor, E. H. Cranmer, and a jury, and it appearing to the court that the North Carolina Railroad Company is a necessary party defendant to this action, it is hereby ordered, adjudged and decreed that the North Carolina Railroad Company be and is hereby made a party defendant and service of this order is hereby directed to be made upon said North Carolina Railroad Company, together with a copy of original petition and copy of order of Corporation Commission, dated 31 August, 1927, and the said North Carolina Railroad Company is to have thirty days from the service of this order in which to answer." Defendants excepted to this order.

From the foregoing order of Judge Cranmer, defendants appealed to the Supreme Court.

Attorney-General Brummitt, Assistant Attorney-General Siler, and I. M. Bailey, Counsel for Corporation Commission; Albert L. Cox and J. M. Broughton, Counsel for City of Raleigh, for plaintiff.

John B. Hyde, Smith & Joyner, Sidney S. Alderman, C. P. Reynolds, W. B. Rodman, R. N. Simms and Murray Allen for defendants.

CONNOR, J. The sole question presented for decision by this appeal is whether or not the Superior Court of Wake County had jurisdiction of this proceeding, which was pending therein on appeal of defendants from the order of the Corporation Commission of North Carolina. For the purposes of this decision, it is conceded that the Corporation Commission has the power, by virtue of the provisions of C. S., 1041 and C. S., 1042, to require railroad companies, subject to its jurisdiction, which have constructed or which maintain a Union Passenger Station in a city or town of this State, to construct and equip a new Union Passenger Station in such city or town, upon its finding that the present station is inadequate. These statutes should be construed liberally in order to effectuate their purposes and to advance the remedy contemplated by the General Assembly, when the statutes were enacted. *Dewey v. R. R.,* 142 N. C., 392, 55 S. E., 292.

The jurisdiction of the Corporation Commission, with respect to the construction of passenger stations, is original; it may be exercised by said Commission, either upon its own motion, or upon petition of interested parties. From all decisions made by the said Commission, in the exercise of its jurisdiction, any party affected thereby may appeal to the Superior Court, C. S., 1097. The right of appeal, conferred by statute, is limited, however, to a party to the proceeding; for purposes of appeal, those who have no property or proprietary rights which are or may be affected by orders of the Commission, are not parties to the proceeding, and have no right to appeal from such orders to the Superior Court. An appeal by persons who are not parties to the proceeding before the Corporation Commission will be dismissed by the Superior Court, for the reason that said court acquires no jurisdiction by such appeal. *Corp. Com. v. R. R.,* 170 N. C., 560, 87 S. E., 785.

Upon appeal by a party to a proceeding before the Corporation Commission from an order made therein, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Corporation Commission. The trial of such issues by the Superior Court is *de novo.* *S. v. R. R.,* 161 N. C., 270, 76 S. E., 554. Its jurisdiction, with respect to the trial of such issues, is derivative and not original, and therefore if the Corporation Commission was without jurisdiction of the proceeding in which the order was made, from which the appeal was taken, because of the absence of a necessary party, or upon any other ground, the Superior Court is likewise without jurisdiction, and the proceeding pending therein, upon appeal, should be dismissed by said court. The principle upon which an appeal from a court of a justice of the peace to the Superior Court, which may be taken from a judgment in an action of which the former court has original jurisdiction, and the latter court only appellate jurisdiction, although the trial in the latter court is *de novo,* is dismissed for want of original jurisdiction in the justice's court, is applicable to an appeal from the Corporation Commission to the Superior Court. This principle is stated in *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901, as follows: "There is a general rule, frequently approved in our decisions, that if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon the appellate court." See cases cited in the opinion of *Adams, J.* This rule is not applicable to appeals pending in the Superior Court from orders or decisions of the clerk in matters of which he has original jurisdiction. C. S., 637.

It appears from the record in this appeal that the North Carolina Railroad Company owns a one-third undivided interest in the Union Passenger Station now maintained in the city of Raleigh, and that its interest in said station is leased to the defendants, Southern Railway Company and Seaboard Air Line Railway Company, the owners of the remaining two-thirds interest. Both said lessees were respondents in this proceeding which was begun before the Corporation Commission; they are defendants in the proceeding which has been docketed, on their appeal, in the Superior Court. The North Carolina Railroad Company, having leased its railroad, which enters the city of Raleigh, and other property owned by it, to the Southern Railway Company, is not now operating said railroad, except through its lessee, as a common carrier. It is not a necessary party to this proceeding for purposes of jurisdiction, either as a respondent before the Corporation Commission, or as a defendant in the Superior Court. The jurisdiction of the Corporation Commission of the proceeding instituted before said Commission, by the petition of the City of Raleigh and others is not affected by the absence of the North Carolina Railroad Company as a respondent to said petition, or as a party to said proceeding.

Even if the said North Carolina Railroad Company was operating its railroad as a common carrier, at the time the petition was filed before the Corporation Commission, it could not be held, under the statute, to be a necessary party to the proceeding instituted by the filing of said petition. The statute provides that "the Commission is empowered and directed to require, when practicable, and when the necessities of the case, in their judgment require, any two or more railroads which now or hereafter may enter any city or town, to have one common or Union Passenger Depot for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such Union Passenger Depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the Commission may prescribe." C. S., 1042. Where more than two railroads enter a city or town, it is not required by the statute that all the companies or corporations operating said railroads shall be required to have one common or Union Passenger Station; any two of such companies may be required by the Corporation Commission to erect, construct and maintain a common or Union Passenger Station in such city or town. The Corporation Commission is not without jurisdiction of a proceeding with respect to the erection, construction and maintenance of a Union Passenger Station, in a city or town, because one or more railroad companies entering such city or town are not made parties to the proceeding. The presence of two or more railroad companies as parties is sufficient for purposes of jurisdiction.

In the instant case, the North Carolina Railroad Company owns an interest in the site on which the Corporation Commission *may* order a Union Station to be erected. If the orders of the Corporation Commission, dated 31 August, 1926, and 6 January, 1928, are sustained upon the trial in the Superior Court, and a further order is made directing that a new Union Passenger Station be erected on said site, rather than on the other site indicated in the findings of the Commission, the North Carolina Railroad Company may then be heard as to the terms and conditions upon which the station shall be erected, constructed and maintained. If the Commission shall order a new Union Passenger Station to be erected on the other site, the rights of the North Carolina Railroad Company, as an owner, and of the defendants as owners and lessees of the present station, may be fully protected by the Commission, which, under the statute, has full and ample power to prescribe the terms and conditions upon which a passenger station shall be erected, constructed and maintained.

The jurisdiction of the Superior Court of Wake County to proceed with the trial of the issues arising upon the record in this cause is not affected by the order that the North Carolina Railroad Company be made a party defendant in this proceeding. This appeal from said order is

Dismissed.

MADA BOSWELL v. TOWN OF TABOR.

(Filed 17 October, 1928.)

1. **Appeal and Error—Review—Presumptions—Record.**

   On appeal, the presumption of law is in favor of the correctness of the charge given below when it is not contained in the record.

2. **Trial—Taking Case or Question from Jury—Nonsuit.**

   A motion as of nonsuit upon evidence in a personal injury suit against an incorporated town where there is evidence tending to show that the plaintiff was aware of an obstruction alleged to have caused the injury, but did not think of it at the time thereof, the light to the place being obstructed by the town, is properly denied under the facts of this case.

APPEAL by defendant from *Cranmer, J.*, at August Term, 1928, of COLUMBUS. No error.

This is an action for actionable negligence, brought by plaintiff against defendant.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was plaintiff injured by the defendant's negligence, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by her own negligence contribute to her injury, as alleged in the answer? Answer: No.

"3. What damage, if any, is plaintiff entitled to recover? Answer: $500."

It is admitted by counsel for the defendant that claim was properly filed in writing with the commissioners of the town of Tabor, and that payment thereof was refused.

H. L. Lyon for plaintiff.
Tucker & Proctor for defendant.

PER CURIAM. The charge of the court below is not in the record. The presumption is that the court below charged the law applicable to the facts on all the issues. At the close of plaintiff's evidence, the defendant made a motion for judgment as in case of nonsuit. C. S., 567.

The defendant's statement of the questions involved is as follows: "The questions involved in this appeal are whether or not upon all of the plaintiff's uncontradicted evidence (none offered by defendant) the court erred in not dismissing the action as of nonsuit, and further in not directing a verdict upon each issue in favor of the defendant. The plaintiff's evidence is that the chief of police of the town of Tabor with some men moved a certain house against the plaintiff's bakery shop, in order to make room for paving certain sidewalks; that a sill used in moving said house was left projecting and resting upon the back step of plaintiff's shop; that both the plaintiff and her husband saw the house moved, saw the sill left there, used the steps by stumbling over the sill and said nothing about it nor made any complaint to any one; that after dark only four days after the sill had been left there, plaintiff having forgotten the sill was there, was injured by catching her toe thereon as she was going out the steps after dark, there being no light to see by."

It was also in evidence that "The people paving the street had taken down the front steps, and the only way we had to get in and out was a side-door. . . . It was our only way of ingress and egress to the woodyard and toilet. . . . After they put this house up against ours there was no way of lighting that space *without a lantern.* Before they moved Mr. Chestnut's house there was a light that shone between us and the Chestnut house, but when they moved Mr. Chestnut's house *they cut off that light.*"

From a careful reading of the testimony, as appears in the record, we cannot hold that the court below was in error. The case is analogous to *Tinsley v. City of Winston-Salem,* 192 N. C., 597. In law we find

No error.

THE WRIGHT COMPANY, INC., v. T. A. GREEN ET AL.

(Filed 17 October, 1928.)

Account, Action on—Verification and Proof of Debt.

In an action upon account by a mercantile corporation, the verification of the complaint containing an itemized statement of goods sold and delivered, made by the secretary of the corporation, raises a prima facie case under the provisions of C. S., 1789.

APPEAL by defendant, T. A. Green, from *Stack, J.,* at April Term, 1928, of NEW HANOVER. No error.

Action upon an account. The issue submitted to the jury was answered as follows:

"In what amount, if any, is the defendant, T. A. Green, indebted to the plaintiff? Answer: $283.79, with interest from 23 September, 1926."

From judgment on the verdict defendant appealed to the Supreme Court.

Isaac C. Wright for plaintiff.

Bryan & Campbell and George L. Peschau for defendant.

PER CURIAM. We find no error on this appeal. The verification attached to the statement of account offered in evidence by the plaintiff is signed by the secretary and assistant treasurer of plaintiff, a corporation. He swears that the statement of account is just and true, and that the account is for goods sold and delivered by plaintiff to defendant. It does not appear therein that the verification is made solely from the books of plaintiff, and without personal knowledge of affiant. The items of the account appear from separate invoices attached to the statement. The verified itemized statement of account was properly admitted as prima facie evidence tending to sustain the allegation in the complaint that plaintiff sold and delivered to defendant the goods described therein, and that there is now due plaintiff by defendant the sum demanded. C. S., 1789.

Assignments of error based upon exceptions to the exclusion of oral evidence offered by defendant, and to the instructions of the court in the charge to the jury cannot be sustained. The relation of defendants, T. A. Green and Ira W. Hewitt, under the written agreement between them, with respect to the operation of the Wilmington Hotel, as correctly construed by the court, was that of partners. The judgment is affirmed. There is

No error.

STATE OF NORTH CAROLINA ON RELATION OF THE BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY v. THE BANK OF SOUTHPORT, PEOPLES UNITED BANK, RECEIVER OF THE BANK OF SOUTHPORT, THE COMMERCIAL NATIONAL BANK, C. L. WILLIAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK, ET AL.

(Filed 24 October, 1928.)

1. **Banks and Banking—National Banks—Ultra Vires Acts.**

   The effect of an *ultra vires* act of a national bank is to be determined by the decisions of the Federal Supreme Court, which hold that an *ultra vires* act is void as being without the power of a corporation, and that ratification cannot affect the limitations of this power.

2. **Same—Bonds—Principal and Surety—Banks Acting as County Treasurer.**

   The act of a national bank in signing as surety the bond given by another bank acting as county financial agent, chapter 262, Public-Local Laws 1925, is *ultra vires* and void.

3. **Same—Recovery of Property Given Under Ultra Vires Contract.**

   The doctrine that where a corporation does an *ultra vires* and void act the party parting with money or property on the faith of the unlawful contract may recover it back or be compensated therefor does not arise upon suit against a national bank as surety on the bond of another bank acting as financial agent of a county where the consideration for becoming surety is a deposit of part of the county funds, for the reason that the national bank receives no money or property from the county, but the bank, the principal on the bond, has a valid claim against the receiver of the national bank for the amount so deposited with it.

APPEAL by plaintiff from *Sinclair, J.*, at June Term, 1928, of BRUNSWICK. Affirmed.

Action on two certain bonds executed by the Bank of Southport, as principal, and the Commercial National Bank, and others, as sureties.

The Bank of Southport, prior to its insolvency, was financial agent of Brunswick County. As such financial agent the said bank executed and delivered the bonds sued on in this action, in compliance with statutory requirements. Chapter 262, Public-Local Laws 1915. At the date of its adjudication as insolvent, and of the appointment of defendant, Peoples United Bank, as its receiver, the said Bank of Southport, as such financial agent, owed to Brunswick County the sum of $180,241.00, for which sum it was liable under the terms of said bonds. Default has been made upon said bonds by the failure of said Bank of Southport, as principal, to account to the board of commissioners of Brunswick County for said sum of money.

The Commercial National Bank of Wilmington, N. C., by its president and cashier and secretary, executed said bonds as one of the sureties thereon. Thereafter, the said Commercial National Bank was declared to be insolvent by the Comptroller of the Currency, who thereupon appointed the defendant, C. L. Williams, as receiver of said Commercial National Bank. The said defendant, C. L. Williams, is now engaged in the performance of his duties as such receiver.

Pursuant to an agreement had and entered into by and between the Bank of Southport and the Commercial National Bank, prior to the execution of said bonds by the said Commercial National Bank, and in consideration therefor, the Bank of Southport deposited some part of the money which came into its hands as financial agent of Brunswick County, with the said Commercial National Bank of Wilmington, N. C.

The defendant, C. L. Williams, receiver of the Commercial National Bank, has refused to allow the claim of the relator, the board of commissioners of Brunswick County, against said bank, on account of its alleged liability as surety on said bonds, upon the ground that the execution of said bonds by the Commercial National Bank, as surety, was *ultra vires.*

In its complaint in this action, plaintiff prays judgment that it recover of defendants the sum of $180,241.00, with interest and costs, and that the defendant, C. L. Williams, receiver of the Commercial National Bank, be ordered and directed to allow its claim against said bank for said sum, to the end that relator may receive dividends thereon to be declared out of the assets of said bank, and paid by said receiver to it as a creditor of said bank, and for other relief.

The defendants, the Commercial National Bank, and C. L. Williams, receiver of said bank, demurred to the complaint filed in this action, in which the facts are alleged as hereinbefore set out. The grounds for the demurrer are:

1. For that the facts alleged in the complaint are not sufficient to constitute a cause of action in favor of plaintiff and against these defendants.

2. For that the execution of said bonds by the Commercial National Bank, as surety thereon, was *ultra vires,* and that the benefit received by said bank from deposits made with it by the Bank of Southport, principal in said bonds, was not sufficient to authorize said Commercial Bank to execute said bonds, as surety, or to render said bank liable on said bonds for any sum of money whatever, upon default of the principal.

From judgment sustaining the demurrer plaintiff appealed to the Supreme Court.

Robert W. Davis and Bryan & Campbell for plaintiff.

J. O. Carr for Commercial National Bank and C. L. Williams, Receiver.

CONNOR, J. The principle that a corporation may lawfully exercise only those powers, which are expressly conferred upon it by its charter, or by the laws in force in the jurisdiction where it was organized, or which are incidental to the exercise of such express powers, has been uniformly and consistently applied by the Supreme Court of the United States to corporations or associations organized under the National Bank Act, U. S. Comp. Stat., 1918, sec. 9657 *et seq.*

In *Central Transportation Co. v. Pullman's Palace Car Co.,* 139 U. S., 24, 35 L. Ed., 55, after a full and exhaustive review of authoritative decisions, pertinent to the question involved, *Gray, J.,* says: "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws, which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

With respect to the validity of a contract entered into by a corporation, beyond the scope of its powers, express or implied, the learned *Justice* further says: "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

There is conflict in the decisions of the courts upon the question as to whether a defense in an action against a corporation, based upon a plea on the part of the corporation that the contract was *ultra vires,* will be sustained under any and all circumstances. Many courts hold that the plea will not prevail, whether interposed for or against a corporation, when it would be inequitable or unjust to allow it, as where the party seeking to enforce performance of the contract, has performed on his part, and the other party has received the benefit of such performance. Some courts, on the other hand, including the Supreme Court of the United States, hold that an *ultra vires* contract is void, as being beyond the powers conferred upon the corporation, and that as a rule no action can be maintained upon it. Tiffany on Banks and Banking, p. 290. It is important, therefore, to bear in mind that the strict view of the doctrine of *ultra vires,* as declared by the Supreme Court of the United States, governs the contracts of national banks, for the reason that such banks are organized under and carry on business pursuant to a Federal statute. See *Thompson v. National Bank,* 146 U. S., 240, 36 L. Ed., 956.

With respect to the power of a national bank to render itself liable upon a contract of suretyship for another, in *Merchants Bank v. Baird,* 160 Fed., 642, it is said: "A national bank may warrant the title to property it conveys, or become liable as an endorser, or guarantor of notes or other obligations which it rediscounts or sells because to do so is incidental to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, endorser or guarantor for him. It cannot for the accommodation of another endorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. *Commercial National Bank v. Pirie,* 27 C. C. A., 171, 82 Fed., 799; *Bowen v. Needles National Bank,* 36 C. C. A., 553, 94 Fed., 925, *ibid.,* 87 Fed., 430. An act that is void because beyond the power of a national bank cannot be made good by estoppel. *McCormick v. Market National Bank,* 165 U. S., 41, 41 L. Ed., 817; *California National Bank v. Kennedy,* 167 U. S., 362, 42 L. Ed., 198."

Conceding that the law with respect to a contract made and entered into by a corporation, *ultra vires,* is as declared in *Central Transportation Co. v. Pullman's Palace Car Co., supra,* in *Citizens Central National Bank v. Appleton,* 216 U. S., 195, 54 L. Ed., 443, *Harlan, J.,* quotes with approval from the opinion of *Gray, J.,* in that case as follows: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

This just and equitable principle is not applicable upon the facts alleged in the complaint in the instant case. The cause of action alleged in the complaint is upon the bonds. The Commercial National Bank of Wilmington cannot be held liable on said bonds, for its execution of said bonds, as surety, was *ultra vires.* The said National Bank received deposits from the Bank of Southport, in fulfillment of the agreement had and entered into between them. The amount of the sums deposited pursuant to this agreement does not appear from the allegations of the complaint. Nor does it appear therein that the Commercial National Bank, at the date of its insolvency, owed any part of the sums deposited with it, pursuant to the agreement, to the Bank of Southport. The benefit, if any, which the Commercial National Bank received from the execution of the bonds, as surety, upon the facts alleged in the complaint, was not sufficient to invoke the principle that, notwithstanding a contract by a corporation is *ultra vires,* the corporation will not be permitted to retain property or money which it received by reason of the unlawful contract. The Commercial National Bank received no money or property from the obligee in the bond; it received only money deposited with it by the Bank of Southport, the principal in said bonds. The said bank has a valid claim against the receiver of the Commercial National Bank for the balance due, if any, on account of said deposits. The relator, the board of commissioners of Brunswick County, has a valid claim against the Bank of Southport for the amount due to Brunswick County by said bank as its financial agent. It is entitled to dividends upon this claim, to be paid by the receiver of said Bank of Southport out of assets in its hands, as the same may be declared. To permit the relator to recover in this action against the Commercial National Bank, and its receiver, would not be just or equitable to the creditors of said bank or of the Bank of Southport. Nor can such recovery be permitted under the law applicable to national banks as declared by the Supreme Court of the United States.

There was no error in the judgment sustaining the demurrer to the complaint. The judgment is in accordance with the authorities, and is therefore

Affirmed.

J. F. BUTLER v. GREENSBORO FIRE AND INSURANCE COMPANY.

(Filed 24 October, 1928.)

Jury—Competency of Jurors, Challenges and Objections—Challenges to the Poll for Cause.

Where a judgment is set aside for surprise and excusable neglect, and a new trial awarded in the Superior Court, and the same jury which gave a verdict in the first trial is empaneled, the party against whom the original verdict was rendered has a right to challenge each juror thereon as a principal challenge for cause as a matter of law, and upon the refusal of the trial court to allow such challenge a new trial will be awarded in the Supreme Court. Challenges for principal cause and challenges to the favor distinguished by ADAMS, J.

APPEAL by defendant from *Sinclair, J.,* at April Term, 1928, of COLUMBUS.

On 16 November, 1925, the defendant issued a policy of fire insurance on certain property of the plaintiff for the sum of $1,800. The policy was delivered to the plaintiff, the premium was paid in advance for two years, and while the policy was in force and effect a building belonging to the plaintiff was destroyed by fire. The total loss is alleged to have been $4,000, and it is admitted that the policy was issued in the sum of $1,800. The direct controversy between the parties was whether the policy of insurance covered the particular property that had been burned. The case was tried in the absence of defendant's counsel and the jury returned a verdict that the house which had been burned was covered by the policy and that the plaintiff was entitled to recover $1,800 with interest from 23 January, 1927. Judgment was given upon the verdict, and thereafter defendant's counsel moved to set aside the verdict for surprise and excusable neglect. The motion was allowed, and the case was thereupon again called for trial, and over defendant's objection it was tried by the jury which had previously tried the case in the absence of the defendant's counsel. The defendant challenged the array and also the individual jurors on the ground that they had previously determined the issue between the plaintiff and the defendant. The peremptory challenges were exhausted, and exception was entered to the ruling that the other jurors were competent.

The greater number of jurors said upon examination that they would not enter upon the trial with a clear, unbiased mind as they had done when the case was first called for trial, and that it would take a great deal of evidence to remove the impression already made on their minds. They answered further that notwithstanding the impression previously made they could hear the evidence and render an impartial verdict without being influenced by what they had heard on the previous trial, and that they could enter upon the consideration of the case with an open mind and make up their verdict upon the evidence uninfluenced by what they had heard. Thereupon the court held the several jurors to be competent. The defendant excepted. The issues were again answered for the plaintiff. Judgment was given upon the verdict and the defendant excepted and appealed upon error assigned.

Powell & Lewis and E. N. Toon for plaintiff.
Herbert McClammy and I. C. Wright for defendant.

ADAMS, J. The two general divisions of challenges are to the array and to the polls. At common law the office of selecting a jury was committed to the sheriff, and his partiality, or "unindifferency," was the usual ground on which the array was challenged. Under our practice a challenge to the array is generally allowed when partiality or misconduct of the summoning officer is brought to the attention of the court, or where in making out the jury list a mandatory statute is disregarded, or where some fatal irregularity is shown. 1 Thompson on Trials, ch. 3, sec. 31; *S. v. Murph,* 60 N. C., 129; *S. v. Haywood,* 73 N. C., 437; *S. v. Martin,* 82 N. C., 672; *S. v. Speaks,* 94 N. C., 865; *S. v. Hensley, ibid.,* 1021; *Moore v. Guano Co.,* 130 N. C., 229. There was no error in overruling the challenge to the array, but the other exceptions present a more serious question.

Challenges to the polls are peremptory and for cause. Those for cause were subdivided at common law into four classes: *propter honoris respectum,* out of respect of rank or honor; *propter defectum,* on account of some defect; *propter delictum,* on account of crime; and *propter affectum,* on account of affection or prejudice. 4 Bl., 352; *S. v. Levy,* 187 N. C., 581. Not with the first three classes, but with the fourth only are we now concerned.

Challenges *propter affectum* are either principal challenges, that is, challenges for principal cause, or challenges to the favor. In the event of a challenge to the favor the finding as a fact by the trial judge that a juror is or is not indifferent is not reviewable on appeal. The theory is this: An opinion finally or fully made up and expressed is a cause of principal challenge as a matter of law; but an imperfect or hypothetical opinion, or one based only on rumor or report is not cause for principal challenge, but for challenge to the favor. *S. v. Ellington,* 29 N. C., 61; *S. v. Dove,* 32 N. C., 469; *S. v. Bone,* 52 N. C., 121; *S. v. Collins,* 70 N. C., 241; *S. v. Kilgore,* 93 N. C., 533; *S. v. Potts,* 100 N. C., 457; *S. v. Bohanon,* 142 N. C., 695; *S. v. Banner,* 149 N. C., 519. An opinion, however, which is based upon rumor or hypothesis is entirely different from an opinion formed by jurors who have been duly empaneled and have returned a verdict upon the testimony of witnesses, although the evidence was not contradicted and the hearing was *ex parte.* In this event the opinion of the jurors is cause for principal challenge. This is the law as declared in *S. v. Benton,* 19 N. C., 196, 212, in which it is said: "Challenges for indifferency are all in one sense because of favor, '*propter affectum,*' but they are distinguished by the law into two sorts, either those working a principal challenge for favor, or those inducing or concluding to the favor. These two sorts sometimes approach each other so closely that it is difficult to draw the line between them; but in contemplation of law, a distinct line of discrimination does exist. The former are said to be because of express favor, or favor apparent, and embrace all those matters which, being shown or admitted, warrant the conclusion of law, without regard to the actual fact, that the person challenged is not indifferent. Thus, if the person challenged be of kindred to one of the parties, the law presumeth that he doth favor his kinsman. So if he hath before given a verdict on the same matter for one of the parties, or hath been an arbitrator thereon, at the nomination of one of the parties, and treated with him thereof; or if he be his servant, or his tenant, liable to his distress, the law itself sees unindifferency, and requires no triers to find it."

The statement in *Baker v. Harris,* 60 N. C., 271, is that counsel for the plaintiff challenged all the jurors (the original panel) for the reason that they had tried the case of *Goodman v. Harris* (the same defendant) for the same act, and had given a verdict for the defendant. The witnesses who testified in *Goodman's case* were to be examined again and others were to be offered. Each juror said he could give the plaintiff a fair and impartial trial. Thereupon the judge ordered the jury to be empaneled and a verdict was returned for the defendant. In granting a new trial the Court said: "According to the explanation in Joy's treatise on the subject, a principal challenge under the head *propter affectum* is where there is express malice or express favor, and is a judgment of law, either without act on the part of the proffered juror or a judgment of law upon his act. Upon the cause assigned in the record before us, viz., the act of trying as a juror the former case (the facts being conceded), the law draws a conclusion as to his fitness or unfitness. Hence, the cause is one for principal challenge which, in the court below, involves questions of law, and is subject to be reviewed in this Court. *Sehorn v. Williams,* 51 N. C., 575, presents questions of challenge to a juror. It was a plain case of principal challenge, and is an authority on the point here stated, if any were needed."

The jurors who returned the first verdict in the case before us were disqualified to serve on the second trial and for this reason the defendant is entitled to another hearing.

New trial.

HATTIE HOWARD AND AMOS HOWARD, HER HUSBAND, v. MARSHALL FAISON, ADMINISTRATOR, ET AL.

(Filed 24 October, 1928.)

Executors and Administrators — Actions — Evidence of Relationship of Heir.

Upon the issue as to whether the plaintiff was the half sister of the intestate and therefore entitled to a distributive share of the estate, testimony of one, in a position to know, that the deceased and the father of the plaintiff affirmed and regarded themselves to be father and son, is competent evidence upon the issue.

CIVIL ACTION, before *Grady, J.*, at Spring Term, 1928, of PAMLICO.

C. L. Daniels, R. O'Hara and Guion & Guion for plaintiff.
Z. V. Rawls, W. H. Lee and F. C. Brinson for defendant.

BROGDEN, J. Lewis B. Williams, a negro preacher, died intestate in 1925. The defendant is his administrator. The deceased left a wife, but no children. The plaintiff, Hattie Howard, claims that she is a half sister of the deceased, and as such entitled to a distributive share of his estate.

The evidence tended to show that the father of the plaintiff was a slave named Israel Williams or Mullins, who, before the Civil War, had married a woman, presumably named Joanna. During the Civil War Israel was sold and the family separated. Thereafter Israel married "Mandy" and had by her one child named Hattie, who is the plaintiff in this action. Lewis Williams, the deceased, was preaching on one occasion at Bryant's Chapel in Jones County. During the course of his sermon he remarked "that he had never seen his father. His mother told him his father was sold during the Civil War." Thereupon Israel Williams, father of the plaintiff, who was in the congregation, asked the preacher, "What was your mother's name?" and the preacher replied, "Joanna." Israel then exclaimed, "I am your father."

An old negro man, 97 years of age, who was present, testified as follows: "The old man (Israel) kept looking at him (Lewis Williams), and when he found out he was his son they like to broke up the church. They run together so and kept a-hugging, and he (Israel) said that was his first wife's son."

The jury was doubtless impressed with the dramatic reunion of these simple souls. The issue submitted to the jury was: "Is Hattie Howard the half sister of Lewis Williams as alleged in the complaint?" This issue was answered in the affirmative. Exceptions were addressed to the judge's charge upon the theory that certain instructions given the jury constituted an expression of opinion upon the weight of the evidence, but an examination of the entire charge discloses that the case was fairly presented and correct principles of law applied. "Ancestry, relationship and descent are questions which are scarcely susceptible of proof except by what has been said about them by persons in a position to know, not so much the actual kinship one person bore to another, as the kinship which one person said he bore to another, or which one person was reputed to bear to another." *Rollins v. Wicker,* 154 N. C., 559, 70 S. E., 934.

There is one expression in the testimony which ought not to be lost from the literature of the world. An old negro testified that the plaintiff had contracted smallpox some years ago and that after that time "she was never so solid in her head." It does not appear how "solid" plaintiff was in her head before the ravages of the disease. At all events, while plaintiff might not have been "solid" in her head at the time of the trial, she was apparently "solid" with the jury.

Affirmed.

STANDARD CROWN COMPANY, INC., v. HARRY E. JONES, TRADING AS JONES BOTTLING WORKS.

(Filed 24 October, 1928.)

1. **Appeal and Error—Review—Findings of Fact.**

   Findings of fact by a referee and approved by the trial judge, supported by any competent evidence, are not reviewable on appeal to the Supreme Court.

2. **Evidence—Parol or Extrinsic Evidence Affecting Writings—Oral Agreement of Contract.**

   Where a letter ordering goods specifies the number and kind or the articles, and is accepted by the seller's letter, it may be shown by the purchaser in the seller's action to recover the contract price, that the order was based upon a previous verbal contract that the goods were to be paid for only as and when ordered, as an unwritten and uncontradictory part of the entire contract.

3. **Customs and Usages—Evidence Thereof—Contracts.**

   An observed custom prevailing at the time of the sale and delivery of goods may be shown by parol as an unwritten part of a contract the law does not require to be in writing, when not contradictory of the written part.

CIVIL ACTION, before *Townsend, J.*, at Chambers, August Term, 1928, of WAKE.

Plaintiff sued the defendant for the purchase price of certain crowns manufactured by the plaintiff and sold to him for use in bottling soft drinks. The defendant denied that there was an unconditional contract for the purchase of crowns and thereupon the cause was duly committed to a referee as provided by law. After hearing the evidence and argument of counsel the referee found certain facts and based thereon certain conclusions of law.

The pertinent findings of fact were as follows: "(6) Early in January, 1920, an agreement was entered into by plaintiff, through said Edward T. Fleming as secretary-treasurer of said company, and the defendant, in Washington, D. C., whereby, for the convenience and benefit of the plaintiff, the defendant was to place with plaintiff an order for a number of gross of crowns to be made up specially with the understanding and stipulation that the defendant would not be required to accept or pay for same except as said crowns might be ordered out by the defendant, and such crowns so accepted by the defendant were to be billed him at market price when shipped, and pursuant to and as a part of said contract the defendant sent to said Fleming the following letter, to wit: Standard Crown Company, Philadelphia, Pa. Gentlemen: Make me up in stock for shipment when ordered: 5,000 gross My-Coca Crowns. 5,000 gross Smile Crowns. 2,500 gross Root Beer Crowns. 2,500 gross Golden Rod Ginger Ale Crowns. We want these crowns made up Special with Jones Bot. Wks. on the top and Raleigh, N. C., at the bottom. Thanking you for your prompt attention. Yours very respectfully, Jones Bot. Wks. Harry E. Jones. Enclosed find sample Golden Rod Ginger Ale Crown. Leave off the lithia compound."

The plaintiff, by letter written by said Fleming, replied as follows, to wit: "26 Jan., 1920. Jones Bottling Works, Raleigh, N. C. Gentlemen: Your letter of the 12th inst. ordering 5,000 gross My-Coca crowns, 5,000 gross Smile crowns. 2,500 gross root beer crowns. 2,500 gross Golden Rod Ginger Ale crowns received and we note that you want all these made up with 'Jones Bottling Works, Raleigh, N. C.' appearing on the crowns. We have already proceeded with this order and as soon as they are ready we will notify you in order that you may commence ordering out against this stock. With the writer's kind personal regards, and thanking you for this business, we are, Yours very truly, Standard Crown Company, Inc. (signed) Sec. & Treas."

The aforesaid letter and reply were part of the aforesaid parol contract and agreement between said parties.

"(9) There was, in January, 1920, and thereafter a well recognized custom and practice of the trade, known to the defendant at the time of the execution of his contract with the plaintiff, that a customer would pay to the seller three cents per gross for obsolete crowns made up for such customer and not ordered out, and the plaintiff under his interpretation of the letter (Exhibit B) was authorized to specially decorate 15,000 gross of crowns, and thereafter shipped the defendant a total of 7,150 gross, leaving 7,850 gross on hand at 3 cents per gross, amounting to $235.00 in which said sum defendant is further indebted to the plaintiff."

Upon the foregoing findings of fact the referee found that the defendant was indebted to the plaintiff in the sum of $783.48 with interest from 3 October, 1927, on the principal sum of $647.00, and the costs of the action.

Both parties filed exceptions to the evidence, and the plaintiff filed exceptions to the findings of fact and conclusions of law made by the referee. Thereupon the question was submitted to the judge, who entered judgment approving and adopting the finding of fact and conclusions of law contained in the report of the referee.

From judgment in accordance with the report of the referee, the plaintiff appealed.

Barwick & Leach for plaintiff.
Wm. B. Jones and J. S. Griffin for defendant.

BROGDEN, J. "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence." *Kenney v. Hotel Co.,* 194 N. C., 44, 138 S. E., 349.

The question, therefore, is whether or not there was evidence to support the findings. The plaintiff contends that the letter of 12 January, 1920, from the defendant to the plaintiff and the reply thereto dated 26 January, 1920, constituted a written contract between the parties. The defendant, upon the other hand, contended that the letters were written in conformity with a prior parol agreement. It is now settled beyond dispute that if the contract is not required by law to be put in writing and a part of said contract is oral, evidence of the oral portion is admissible if it does not contradict or vary the writing, for the purpose of establishing the contract in its entirety. *Palmer v. Lowder,* 167 N. C., 331, 83 S. E., 464; *Henderson v. Forrest,* 184 N. C., 234, 114 S. E., 391; *Miller v. Farmers Federation,* 192 N. C., 144, 134 S. E., 407; *Hite v. Aydlett,* 192 N. C., 166, 134 S. E., 419.

The defendant testified that he made a verbal agreement with an agent of plaintiff according to which the plaintiff would make up the crowns and keep them in stock for defendant, and ship them as needed, at the prevailing market price, and that thereupon the defendant agreed with the agent of plaintiff that upon his return to Raleigh he would make up an order in accordance with the conditions stipulated, and in pursuance of such agreement the letter of 12 January was forwarded to plaintiffs. It will be observed that the letter of 12 January stipulates no price for the crowns and specifies no time for shipment except "when ordered." As we interpret the evidence of the alleged verbal contract in connection with the letters, it does not appear that the parol agreement alleged by the defendant is totally inconsistent with the subject-matter of the letters. Certainly it cannot be said that there was no evidence of the parol agreement, and under the authorities, the finding of fact by the referee, approved by the trial judge, is conclusive.

With respect to the ninth finding of fact, the plaintiff contends that there was no evidence to support such finding to the effect that there was a "well recognized custom and practice of the trade."

With reference to the amount a customer should pay for "obsolete crowns made up for such customer and not ordered out," a witness for defendant testified: "That it was a general custom and was accepted by all the manufacturers at the time this order was given in January, 1920." While there was an apparent conflict, this testimony was some evidence of the custom relied upon. The rule is stated thus in *Penland v. Ingle,* 138 N. C., 456, 50 S. E., 850: "The character and description of evidence admissible for establishing the custom is the fact of a general usage and practice prevailing in the particular trade or business, and not the opinions of witnesses as to the fairness or reasonableness of it." The law of custom, as established in this jurisdiction, is discussed in the following cases: *Blalock v. Clark,* 137 N. C., 140, 49 S. E., 88; *Penland v. Ingle,* 138 N. C., 456, 50 S. E., 850; *Bank v. Floyd,* 142 N. C., 187, 55 S. E., 95; *McDearman v. Morris,* 183 N. C., 76, 110 S. E., 642.

As the record discloses that there was evidence to be considered by the referee of a verbal agreement and of a general custom of the trade, his findings of fact, having been approved by the trial judge, determine the controversy.

Affirmed.

PEARL LONG v. T. K. MEARES.

(Filed 24 October, 1928.)

Replevin—Liabilities on Bonds and Undertakings—Liability of Surety—Claim and Delivery.

Where a replevy bond is given in claim and delivery, and in the procedure in the Superior Court the defendant is required by the judge to give an additional bond, without reference to the first, after the defendant has disposed of the goods replevined by him, the surety on the replevy bond is not discharged by the giving of the second bond with another surety, both bonds being cumulative.

CIVIL ACTION, before *Sinclair, J.,* at April Term, 1928, of BRUNSWICK.

The plaintiff instituted an action before a justice of the peace against the defendant, T. K. Meares, for possession of a certain quantity of tobacco. The tobacco was seized, and thereupon the defendant, O. Meares, signed a replevin bond in the sum of $300 as surety for the defendant, T. K. Meares, who took the tobacco and sold it. The justice of the peace before whom the action was instituted gave judgment for the plaintiff, and the defendant, T. K. Meares, appealed to the Superior

Court. In the Superior Court a consent judgment was signed by W. M. Bond, judge presiding. Thereafter T. K. Meares made a motion to set said judgment aside upon the ground that the attorney had no authority to consent to the judgment of the Superior Court. Thereafter, by consent, W. A. Devin, judge presiding, set aside the former consent judgment rendered by Judge Bond and ordered the cause set for trial at the next term of court. It was further ordered that the defendant, T. K. Meares, "execute a good and sufficient bond with surety to be approved by the clerk of the Superior Court of Brunswick County in the sum of $225.00," etc. One W. A. Long signed the said bond for $225.00 as surety for T. K. Meares. Thereafter at the January Term, 1928, upon the verdict of the jury, judgment was rendered against the defendant, T. K. Meares, "and his sureties" in the sum of $102.19, together with costs. The plaintiff upon due notice lodged a motion that execution issue against the defendant, T. K. Meares, and his sureties on both bonds. The trial judge found as a fact "that the bond given by said T. K. Meares to W. A. Long as surety was an additional bond to secure and pay any sum or sums recovered by plaintiff over and above the amount awarded by her before H. A. Mintz, justice of the peace." Thereupon the trial judge ordered execution to issue against T. K. Meares and his surety, O. Meares, on the $300 bond, and also against T. K. Meares and his surety, W. A. Long, on the $225 bond.

From such judgment the defendant O. Meares, surety, appealed.

Robt. W. Davis for plaintiff.
Pace & Holmes for defendant, O. Meares.

BROGDEN, J. Did the second bond for $225 supersede the original bond of $300, or are said bonds cumulative?

The defendant contends that, when the new bond for $225 was executed by a different surety, he was thereby relieved of liability on the original $300 replevin bond. The judgment requiring the giving of the new bond of $225 made no reference to the original replevin bond of $300 which the defendant, O. Meares, signed as surety. The determinative principle of law is thus stated in the headnote of *Nimocks v. Pope,* 117 N. C., 315, 23 S. E., 269: "A surety on a replevin bond, given for the return of property in an action of claim and delivery, by signing such bond makes the defendant principal his agent to compromise plaintiff's claim for damages and upon a compromise being made by such defendant, without the knowledge or consent of the surety, the court is authorized to enter up judgment against the defendant and his surety in accordance with such compromise." While, of course, it is fully recognized in this jurisdiction that extension of time granted to the principal or other acts which may result in substantial prejudice to the surety will discharge such surety; nevertheless, this principle does not apply to a replevin bond given in a pending suit in conformity with the provisions of the statute. The reason is that, in such cases, sureties on such bonds within the limits of their obligation are considered parties of record, and the defendant, their principal, becomes their duly constituted agent to bind them by compromise or adjustment or in any other manner within the ordinary and reasonable purview and limitation of the action. *McDonald v. McBryde,* 117 N. C., 125, 23 S. E., 103; *Wallace v. Robinson,* 185 N. C., 530, 117 S. E., 508; *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466.

As we interpret the present record and the law applicable thereto, we are of the opinion that the judgment of the trial judge was correct.

Affirmed.

THADDEUS GOSS, BY HIS NEXT FRIEND, T. R. GOSS, v. WARREN R. WILLIAMS.

(Filed 24 October, 1928.)

1. **Husband and Wife—Rights, Duties, and Liabilities—Liability of Husband for Negligence of Wife in Driving "Family Car"—Agency.**

   Where the husband is the owner of an automobile which he permits to be used for family purposes, and while in such use by his wife she permits another to drive it, and remains with such driver on the front seat, and by the negligence of the one driving a child is struck and injured: *Held,* the negligence of the driver acting under the control and authority of the wife is the wife's negligence, and the husband is responsible in damages for the injury if proximately caused thereby, under the implied agency of the wife, under the "family-use" doctrine.

2. **Trial—Taking Case or Question from Jury—Nonsuit.**

   Defendant's motion as of nonsuit upon the evidence will be denied if there is any sufficient evidence, testified to by either the plaintiff's or defendant's witnesses, circumstantial or otherwise, viewed in the light most favorable to the plaintiff, to take the issue to the jury for determination. C. S., 567.

3. **Appeal and Error—Nature and Grounds for Appellate Jurisdiction.**

   The jurisdiction of the Supreme Court on appeal is confined to matters of law or legal inference, properly presented, appearing in the record. Const., Art. IV, sec. 8.

4. **Highways—Regulation and Use for Travel—Use of Highway and Law of the Road—Evidence.**

   Where damages are sought for the negligent driving of an automobile on the wrong side of the highway in violation of statute, evidence of this fact may be shown upon the trial by the tracks made by the automobile at the place, broken glass from the reflectors, and the blood of the person injured in the collision.

5. Same—Intersections—Negligence.

Under the provisions of C. S., 2598, as amended by chapter 148, section 1 (p), Public Laws of 1927, where one public highway joins another but does not cross it, the point where they join is an intersection of public highways within the meaning of the statute.

6. Same—Statutes.

Under the provisions of C. S., 2616, 2618, amended by Public Laws 1925, it is negligence *per se* for one to drive his automobile more than fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed for one hundred feet therefrom, and damages may be recovered for its violation when the proximate cause of the injury: *Held,* the amendment of 1927, reducing the distance from 100 feet to 50 feet has no retroactive or continuing effect.

7. Same—Degree of Care—Children.

One driving an automobile upon a highway is not relieved of liability by the fact alone that a seven-year-old child ran before his automobile suddenly and without previous indication, for the law requires him to use due care, especially in regard to children, to avoid the injury between the time he saw, or by the exercise of proper care, he should have seen the child, and the time of the injury.

8. Jury—Competency of Jurors, Challenges and Objections—Challenges to the Favor.

Where a defendant in a personal-injury suit carries indemnity insurance, in passing upon the jury it is not error for the trial judge to permit the defendant's attorney to ask for his information only, whether the juror challenged was an agent or representative of the indemnity company, the question being restricted to this purpose openly by the court, and the refusal of the trial court to grant a new trial upon this ground is not reversible error.

Brogden, J., dissenting.

Appeal by defendant from *Sinclair, J.,* at November Term, 1927, of Wake. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was plaintiff injured by the negligence of defendant, as alleged? Answer: Yes.

"2. What damage, if any, is plaintiff entitled to recover? Answer: $3,000."

This is an action for actionable negligence brought by Thaddeus Goss, a minor, through his father, T. R. Goss, his next friend, against the defendant Warren R. Williams.

The plaintiff contends that the defendant, Warren R. Williams, lives in Sanford, N. C., and was the owner of a Buick sedan No. 35560. That his family consists of himself, his wife and five children. On Wednesday, 16 March, 1927, defendant's wife, Mrs. Warren R. Williams, drove the car to Raleigh, N. C., with Mrs. J. F. Foster, Mrs. C. L. Williams, and Mrs. W. R. Makepeace. They went to Raleigh to shop. On the return trip they left Raleigh about 5 o'clock, and Mrs. W. R. Makepeace drove the car, with Mrs. Warren R. Williams' permission, who sat on the front seat with her and the others sitting on the back seat. About two miles south of Apex, on the way to Sanford, the car Mrs. W. R. Makepeace was driving struck the plaintiff, Thaddeus Goss, a minor between 7 and 8 years old, and seriously and permanently injured him. That Mrs. W. R. Makepeace was driving the car about 30 to 35 miles an hour. The highway, route No. 50, at the place of the injury to the boy, runs practically north and south, and was about 40 feet wide, and straight along where the injury occurred going towards Sanford for a long distance. That the Riggs road was a public road and intersects with route No. 50, entering from the west. The Carl Barker house was on the right-hand side of highway No. 50, going south and Thaddeus Goss' father's house on the left-hand side, and was reached by a pathway up an embankment, just opposite the Riggs public road, which intersects with highway No. 50; that Thaddeus Goss was with his sister, Mary Goss. She stopped at the Barker house to talk to Mrs. Barker, being in the edge of the Riggs public road; that Thaddeus walked by her to cross route No. 50 and go up the pathway to his father's house. When he left her he was traveling at a slow gait. Mary Goss testified: "I heard no horn blow"; that he had to cross the highway, which was about 40 feet wide, and he had reached within 3 feet of the other side of route No. 50, and was within about the same distance of the path, when he was suddenly, without any warning, struck by defendant's automobile; that the left-hand light of the car driven by Mrs. Makepeace was turned around and the glass over it was "bursted out," indicating that the left of the car struck the boy, and the car was on the left instead of being on the right of the center of the road; that the track of the car indicated that it was on the left of the road some 100 feet going south before it struck the boy; that a pile of glass, as much as a handful, was on the road 3 or 4 feet from the embankment on the left-hand side of route No. 50 going towards Sanford. The glass was about in front of the pathway. There was blood also on the left-hand side of the road going towards Sanford, where the glass was. The blood was along the road 23 steps in a southern direction from the glass; that after being struck the boy was carried by the car twenty-three steps southward, where he was dropped off, and then the car turned to the right-hand side of the road and stopped, some 100 feet below the Riggs public road where it intersects with route No. 50; that the car was being very rapidly driven and left the center of route No. 50 and turned to the left 100 feet from where it struck him. The car, at the speed it was running could have been stopped, and defendant's witness testified was stopped, within 40 to 50 feet. The path leading to the Goss house was almost directly opposite the intersection of the Riggs public road with route No. 50.

One of plaintiff's witnesses testified in regard to tracking the car, and said: "I noticed a car that came around about 100 feet up the road coming over on the left-hand side and struck something and turned and went back to the right-hand side of the road."

Defendant's contentions were to the contrary. The car was being carefully driven on the right-hand side of the road going towards Sanford. The brakes were in good order. The glass on the left-hand light was not broken. The Riggs public road was obscured by an embankment. That Thaddeus Goss, the plaintiff, ran down an embankment, 3 or 4 feet high—was running. "A little boy ran out of the edge of the embankment, just like he came out of the air, and he was running, and ran right off in front of the car. . . . When he emerged from behind the embankment and he did not stop running. He just ran down the embankment and in front of the car."

The defendant in the court below made numerous exceptions and assignments of error. The material facts and assignments of error will be considered in the opinion.

Percy J. Olive and J. C. Little for plaintiff.

Allen & Duncan, Winston & Brassfield, A. A. F. Seawell and Murray Allen for defendant.

Clarkson, J. The defendant moved for judgment as in case of nonsuit at the close of plaintiff's evidence and at the conclusion of all the evidence. C. S., 567. The evidence on the part of plaintiff was circumstantial in its nature, but sufficient to be submitted to the jury. The probative force was for them to determine.

"It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Christman v. Hilliard,* 167 N. C., p. 6; *Oil Co. v. Hunt,* 187 N. C., p. 159; *Davis v. Long,* 189 N. C., 131; *Nash v. Royster,* 189 N. C., 410; *Smith v. Ritch, ante,* at p. 74.

This Court's jurisdiction is confined to review, upon appeal of "any decision of the courts below, upon any matters of law or legal inference." Const. N. C., Art. IV, sec. 8.

We think there are several important propositions of law for this Court to determine:

1. "Whether liability of the owner for negligent operation of a 'family purpose' car arises when the car is being used by the wife of the owner and driven by a third person by permission of the wife of the owner, the latter being present in the car on a seat beside her?"

In *Watts v. Lefler,* 190 N. C., at p. 725-6, this Court said: "The father—the owner of the automobile and the head of the family—has the authority to say by whom, when and where his automobile shall be driven or he can forbid the use altogether. With full knowledge of an instrumentality of this kind, he turns over the machine to his family for 'family use.' When he does this, under the 'family doctrine,' which applies in this State, he is held responsible for the negligent operation of the machine he has entrusted to the members of his family."

In the instant case, under the "family purpose" doctrine rule, which prevails in this jurisdiction, if the wife was actually operating the car negligently, and the negligence was the proximate cause of the injury, her husband would be liable. She was sitting on the front seat, having turned the wheel over to one of the shopping party. Under the "family purpose" doctrine rule, the wife had control and authority over the car, and over the driver, and, in contemplation of law, the negligence of the driver was her negligence, which fastened liability on the defendant owner of the automobile. Could it be said that if she tired of driving and turned the wheel over to a helper, an instrumentality of this kind, that liability upon the owner for negligent operation would not arise? We think not. Under the circumstances, there is an implied agency that fastens liability on the owner.

It is a matter of common knowledge that the father, the head of the family, the owner of the automobile, when he turns a car like the one in question, a Buick sedan, over to his wife for use, that she does not ride in it alone, but usually rides with friends. Especially is this so on a trip of some distance, the driver becomes tired or for other causes the wheel is frequently turned over to some member of the party. Under such circumstances as in the present case, the wife having the control, authority and direction over the car, and she in turn permits one of the party to run it and sits on the front seat beside her, the owner of the car impliedly consents, the agency is extended, the driver is a helper and the owner will be held liable for actionable negligence on the part of the person at the wheel. See *Albritton v. Hill,* 190 N. C., 429.

In *Ulman v. Linderman,* 44 N. D., at p. 40 (10 A. L. R., p. 1440), it is said: "The question is, therefore, squarely presented, upon these allegations, of the liability of the owner for the negligent act of the stranger. If, at the time of the accident, the wife of the defendant were driving the car for purposes of the owner's business (and the pleasure of the family is a business of the master), the husband would have been liable for its negligent operation (citing numerous authorities). . . . Is the husband still liable, as master or upon principles of agency, where the wife, authorized to operate the car, permits or directs, in her presence and stead, that the car be operated negligently by a stranger, for purposes of the business of the master? In such or similar cases a long line of authorities have held a liability to attach to the master. In many cases this holding is based upon the reasoning that the stranger is a mere instrumentality by which the servant or agent performs his duties, a longer arm which the servant or agent wields and controls; that the master's business is being performed, therefore, by the agent or servant through the stranger in question," citing numerous authorities.

The "family purpose" doctrine is recognized in Kentucky. In *Thixton v. Palmer,* 210 Ky., p. 638, it is held: That where a mother had allowed her son the use of an automobile to take a friend and two girls riding, she would be responsible for injuries resulting from negligence of the friend, whom the son had permitted to drive while he rode in the back seat. Annotated in 44 A. L. R., p. 1379.

In the case of *Kayser v. Van Nest,* 125 Minn., 277, 146 N. W., 1091, 51 L. R. A. (N. S.), 970, a father kept an automobile for the pleasure of his family. It was usually driven by his daughter, nineteen years of age. On the occasion of the accident, while driving she was joined by a party of young people, and she permitted a cousin to drive the car. The Court in that case said: "The daughter remained in the car, and, although not personally operating it, had not relinquished control over it, nor turned it over to another to use for his own purposes. It was still being used in furtherance of the purpose for which she had taken it out." *Thixton v. Palmer, supra.*

Cardozo, C. J., in *Grant v. Knepfer,* 245 N. Y., 158, 54 A. L. R., at p. 848-9, says: "The statute may be said in a general way to have brought about the same results as had been attained in some other jurisdiction without reference to any statute by the so-called doctrine of 'the family automobile.' *Ibid.; Ferris v. Sterling,* 214 N. Y., 249, at p. 252, 108 N. E., 406, Ann. Cas., 1916D, 1161. Only a narrow construction would permit us now to say that an owner placing a car in the care of members of his family to be used for their pleasure or for the family business would escape liability if wife or son or daughter should give over the wheel to the management of a friend. The ruling has been more liberal whenever the question has come up," citing the cases heretofore quoted.

The question is for the first time presented to this Court. The common law is elastic to meet the complex problems of the age as they arise, but courts should be slow and not enter the realm of legislation. Last year 22,160 people were killed in automobile accidents on the highways of the United States. In North Carolina, the last year, 571 were killed. During the first six months of this year 262 people in North Carolina were killed in automobile accidents, or an average of about one and a half a day, while an additional 2,088 were injured. The State total of motor cars on 1 August, 1928, was 440,258. Passenger cars numbered 396,295; trucks 43,963. State average, one motor car to every 6.6 inhabitants.

Human life is too cheap and restraint is necessary. The numbers killed and crippled each year are appalling. It is necessary, in reason, for the courts to hold the owners of automobiles, when they turn over an instrumentality of this kind to the family for family use, to strict accountability. This is one of the means to safeguard the public. The head is usually the one of financial responsibility—at least he is the owner of the instrumentality. Upon the principles cited, consonant with natural justice, he should be held responsible.

This principle does not extend to an automobile loaned to another.

In *Reich v. Cone,* 180 N. C., at p. 268, it is said: "When a motor car is used by one to whom it is loaned for his own purposes, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent, and that injury might occur." *Tyson v. Frutchey,* 194 N. C., p. 750.

2. Is it permissible to admit testimony as to the location of certain glass and blood and also tracks of the automobile on the highway as evidence? We think so. There was sufficient indentification that the tracks of the automobile were made by defendant's car, and the glass and blood were along the route of the automobile after it struck the boy.

In 42 C. J., part section 1023, page 1223, it is said: "Evidence of the physical conditions existing at the scene of the accident or collision is ordinarily admissible." *Kepley v. Kirk,* 191 N. C., 690; *Mitchell v. Atkins,* 192 N. C., 376.

3. The defendant assigned error that the court below instructed the jury as follows: "You are instructed as a matter of law that from the evidence in this case the juncture of the State highway No. 50 and the road testified to as the 'Riggs' road or 'Green Level' road constituted intersecting highways within the meaning of the law." We think this charge correct. All the evidence was to the effect that the Riggs road was a public road. *S. v. Haynie,* 169 N. C., at p. 282. The wording of the charge was not prejudicial.

C. S., 2598, in part, is as follows: "The term 'public highway' or 'highways' shall be construed to mean any public highway, township, county or State road, or any county road, any public street, alley, park, parkway, drive or public place in any city, village or town."

Public Laws 1927, ch. 148, sec. 1 (p), defines "Intersection" as follows: "The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other." *Manly v. Abernathy,* 167 N. C., 220; *Mount Olive v. R. R.,* 188 N. C., 332; *Davis v. Long,* 189 N. C., 129; *Fowler v. Underwood,* 193 N. C., 402.

Webster's Dictionary defines the word "Intersect" as having as one of its meaning that of "to cut into," etc.; "to cut into another," etc., and the word "Intersection" as meaning geometrically, "the point or line in which one line or surface cuts into another." The words "intersecting roads" therefore embrace the junction of roads as well as crossroads. *Mapp v. Holland,* 138 Va., 519, 122 S. E., 430; Vartanian, Law of Automobiles, Part II, ch. 1, p. 414, note.

The injury complained of occurred on 16 March, 1927. The uniform motor vehicle operation act was passed by the General Assembly of 1927 and went into effect on 1 July, 1927. It repealed "all laws and clauses of laws in conflict." The decisions of this Court defining "intersection" prior, are substantially in accord with the definition given by the act.

4. The defendant assigned error that the court below instructed the jury as follows: "You are instructed that if a driver of a motor vehicle traverses an intersecting highway at a rate of speed greater than fifteen miles per hour, he does so in violation of law and in such cases would be guilty of negligence *per se.* You are instructed that a driver's view is obstructed at intersecting highways when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

In *Newton v. Texas Co.,* 180 N. C., at p. 565, it is held: "The violation of a statute, or an ordinance, is negligence *per se,* or rather, to speak more accurately, it is itself a distinct wrong in law, and all that is needed to make it an actionable wrong is the essential element of proximate cause, for 'wrong and damage' constitute a good cause if there be a causal connection between them." *Stultz v. Thomas,* 182 N. C., 470; *Davis v. Long, supra; Albritton v. Hill, supra.*

C. S., 2618, amended by chapter 272, Public Laws 1925, is as follows: "No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: *Provided,* that no person shall operate a motor vehicle on any public highway, road or street of this State at a rate of speed in excess of: . . . (D)

Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such intersection for a distance of two hundred feet from such intersection." Under the Laws of 1927, ch. 148, *supra,* Art. II, sec. 4 (3) changes this and says: "Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed." This act went into effect after the injury in the present case.

5. Defendant assigned error that the court instructed the jury as follows: "The law requires every person operating an automobile upon a public highway to use that degree of care that a reasonably careful person would use under like or similar circumstances to prevent injury or death to persons on or traveling over, upon or across such highways, and any person so operating an automobile when approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway, or a corner in a highway when the operator's view is obstructed, shall slow down and give a timely signal with his bell, horn or other device for signaling, and the failure of any person so operating such motor vehicle so to do is negligence."

C. S., 2616, in part, is as follows: "Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling." The court below charged substantially in the language of the statute.

6. The defendant assigned error that the court instructed the jury as follows: "You are instructed that even though the injured party through his own negligence placed himself in a position of peril, he may recover if the one who injured him discovers, or by the exercise of ordinary care could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout. You are instructed that the mere fact that a child runs in front of a moving motor vehicle so suddenly that the driver had no notice of danger, does not necessarily relieve a defendant from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or when by the exercise of reasonable care, such driver

could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults." It may be noted that defendant tendered no issue as to contributory negligence.

In *S. v. Gray,* 180 N. C., at p. 701, it is said: "The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or by the exercise of reasonable care should see, on or near the highway. More than ordinary care is required in such cases. *Deputy v. Kimmell,* 80 S. E. (W. Va.), 919; 8 N. & C. Cases, 369."

"Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly." *Cooley, C. J.,* in *Power v. Harlaw,* 57 Mich., 107; *Loughlin v. Penn. R. R. Co.,* 240 Pa. St. Rep., at p. 179; *S. v. Gash,* 177 N. C., at p. 598; *Hoggard v. R. R.,* 194 N. C., at p. 259.

On the facts and circumstances of the case, we do not think the assignment of error can be sustained.

7. In *Featherstone v. Cotton Mills,* 159 N. C., p. 431, it is said: "Under our decisions the stockholders, officers, or employees of the casualty company would not be impartial or competent jurors to determine the issue, and under all ordinary conditions the questions asked by counsel on the *voir dire* were not improper. *Norris v. Mills,* 154 N. C., 474; *Blevins v. Cotton Mills,* 150 N. C., 493."

In selecting the jury the following questions were asked the jurors by counsel for the plaintiff, over defendant's objection:

"Q. Gentlemen of the jury, as the jury is now constituted, is there any member of the jury that is interested as agent, or otherwise, in any automobile indemnity insurance company?"

After the question was propounded, the court said to the jury: "Gentlemen, that has nothing in the world to do with the merits of the case, and should not be regarded, and it is just a general question asked for the information of the counsel, and has nothing to do with the merits of the case." Defendant's counsel then moved for a *venire de novo* upon the ground that counsel for the plaintiff was permitted to make inquiry of the jury as above stated. Motion overruled and defendant excepted. Thereupon the court made the following entry: "The court finds as a fact that in private conference with counsel before any member of the jury was interrogated it was admitted by counsel for the defendant that the defendant did have indemnity insurance in the Maryland Casualty Company of Baltimore, Maryland, and that Mr. Charles E. Johnson, of Raleigh, is the agent of the company. The court further finds as a fact that counsel for plaintiff propounded the question to the jury in good faith and merely for the purpose of ascertaining whether or not any member of the jury was the representative of or had any interest in the insurance company. The court also finds as a fact that counsel for the plaintiff stated before the question was asked the jury that they had no information that any member of the jury was the representative of, or had any interest in such indemnity company." After the jury was empaneled, the defendant's counsel moved that a juror be withdrawn and mistrial ordered. Motion overruled; defendant excepted.

In *Luttrell v. Hardin,* 193 N. C., at p. 269, it is said: "It has been repeatedly held that the fact that a defendant in an actionable negligence action carried indemnity insurance could not be shown on the trial. Such evidence is incompetent." *Smith v. Ritch, ante,* 72.

This principle should be adhered to, but frequently on the trial this fact creeps out in one way or another. The business of indemnity insurance has become, as a matter of common knowledge, a large and increasing one with a vast number of employees. As to whether the court below should, upon motion, order a new trial concerning the conduct of the trial, in matters of this kind, must be left largely to the sound discretion of the court below, within the limitations prescribed by law. *Fulcher v. Lumber Co.,* 191 N. C., p. 408, where the matter is thoroughly discussed. We do not think the assignments of error can be sustained.

There are other assignments of error we have not considered, as we do not think them material. No new questions of law. The case has been carefully considered here. The court below gave a clear and thorough charge covering every phase of the law applicable to the facts.

Every human aid was rendered the young lad after he was struck by the car by the women in the car. They are to be commended for their prompt and efficient service to the lad under trying circumstances. The jury have found the facts. In law, we find

No error.

BROGDEN, J., dissenting.

E. E. MILLS v. APEX INSURANCE AND REALTY COMPANY ET AL.

(Filed 24 October, 1928.)

1. Reference—Report and Findings—Affirmance in Part and Re-reference.

Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge has jurisdiction to re-refer the case to the same referee for further action as a matter within his discretion and not appealable, but he may not refer it to another referee with partial approval thereof for action upon the unapproved parts. C. S., 578.

2. Same.

The trial judge has statutory authority to remove a referee for his failure to perform his duties as such, and to appoint another to perform them; as to whether he may set aside the report without cause and appoint another, *quere?*

CIVIL ACTION, before *Cranmer, J.,* at Second May Term, 1928, of WAKE.

The plaintiff instituted an action against the defendants to recover certain amounts in dispute growing out of an exchange of land. The defendants denied liability, and upon issue joined on the pleadings the trial judge ordered a compulsory reference, appointing John W. Hinsdale, Esq., referee. Thereafter the referee heard the evidence and argument of counsel and prepared a report setting forth therein his findings of fact and conclusions of law. Both parties excepted to the order of reference and demanded a jury trial. Both parties also filed exceptions to the findings of fact and conclusions of law made by the referee.

The cause came on for hearing and the following judgment was entered: "This cause comes on for hearing at the Second May Term, 1928, of the Superior Court of Wake County, upon the pleadings, the report of the referee and exceptions filed to said report, whereupon a jury is empaneled to try the cause. The pleadings in the cause having been read, and the jury by the direction of the court having retired from the court room, the report of the referee was read to the court, and thereupon counsel for the defendants stated to the court the substance of the evidence relating to the findings of fact and conclusions of law of the referee as to which exceptions have been filed, exceptions to said report having been filed by all parties both plaintiff and defendants, and counsel for the respective parties having stated to the court the contentions of the respective parties, the court is of opinion that the ends of justice will be promoted by a further reference of this cause, whereupon it is ordered: 1. That a juror be withdrawn and a mistrial had. 2. That the findings of fact and conclusions of law as stated in the report of the referee and as to which no exceptions have been filed by any of the parties to the cause be, and the same are hereby confirmed and adopted by the court. 3. As to the findings of fact and conclusions of law as stated in the report of the referee and as to which exceptions have been filed by any of the parties to the cause, the said report be not confirmed. 4. That except as to the findings of fact and conclusions of law of the referee which are by this order confirmed as hereinbefore stated, the court in its discretion hereby orders that this cause be, and is hereby referred to Oscar Leach, Esq., of Raleigh, with direction to consider the pleadings, the evidence heretofore taken in the cause and such further evidence as any of the parties to the cause shall offer and thereupon to make and report to this court his findings of fact and conclusions of law, and to state an account between the respective parties. This cause is retained for further hearing and order."

To the foregoing judgment submitting the cause to another referee, the plaintiff excepted and appealed.

Little & Barnes for plaintiff.
Ruark & Fletcher for defendants.

BROGDEN, J. Can the trial judge, upon the submission of the report of a referee, in a compulsory reference, resubmit the cause to another referee with power to reopen and rehear the same?

C. S., 578, empowers a trial judge to "review the report, and set aside, modify or confirm it in whole or in part," etc. This supervisory power is broad and comprehensive. *Dumas v. Morrison,* 175 N. C., 431, 95 S. E., 775. In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. *Commissioners v. Magnin,* 85 N. C., 115; *Lutz v. Cline,* 89 N. C., 186; *S. v. Jackson,* 183 N. C., 695; 110 S. E., 593; *Coleman v. McCullough,* 190 N. C., 590, 130 S. E., 508.

It was suggested in the *Coleman case, supra:* "It may not be inappropriate to suggest that when a cause is remanded to a referee, controversy may be prevented by an order pointing out the special purpose of the recommittal—whether to take additional evidence, or to make additional findings of fact on the evidence taken, or simply to revise the report." The practical purpose of a compulsory reference, when exceptions have been filed to the report of the referee, is to develop and specifically delimit the issues to be determined by a jury, for the reason that, in such references, a jury trial is not waived, and the parties as a matter of law are entitled to have the issues answered by a jury. The apparent meaning of the statute is that the report, duly made by a referee, is before the court rather than the referee making the report; unless, of course, there is evidence or suggestion, at least, that the referee has not properly performed his duty.

The statute further contemplates that the trial judge must act upon the report. Judicial action is confined by the statute to reviewing, setting aside, modifying or confirming in whole or in part the report to the end that the ultimate issues of fact may be produced in bold and clear relief. While the order of the trial judge is based upon discretion, this discretion is bounded by the statute, and as we interpret the record the judgment appealed from does not fall within the boundaries prescribed by law, and was therefore erroneously made. If the report of the referee had been set aside, a different legal situation would have been presented; or if there had been evidence tending to show that the referee had failed to perform his duty as contemplated by statute, then in such event the power of the trial judge to remove him would doubtless be unquestioned.

Reversed.

TOWN OF GREENVILLE ET AL. v. STATE HIGHWAY COMMISSION.

(Filed 24 October, 1928.)

1. **Highways—Highway Commission—Injunctions Against—Equity.**

The action of the State Highway Commission in building the highways and bridges of the State is of public interest 3 C. S., 3846(a), and equity will not enjoin them in this work when injury by flooding lands may probably result in the future, there being an adequate remedy to the landowners at law in the defendant's right to condemn under the statute applicable.

2. **Same.**

Equity will not grant injunctive relief against the continued construction of a highway by the State Highway Commission when the injury to adjoining lands is speculative and rests only in conjecture as to resulting damages.

3. **State—Claims Against the State—Nature and Grounds Therefor—Highway Commission.**

The State Highway Commission is an unincorporated agency of the State, and an action sounding in tort will not lie against it, and the remedy, if any, is statutory only.

APPEAL by plaintiffs from a judgment rendered by *Grady, J.*, at Chambers on 26 February, 1928. From PITT. Affirmed.

Julius Brown and F. M. Wooten for plaintiffs.
Charles Ross for defendant.

ADAMS, J. The town of Greenville and the other plaintiffs who are landowners brought suit permanently to enjoin the defendant from completing, as now contemplated, the construction of part of a public highway in Pitt County, including a bridge across Tar River. The plaintiffs alleged that if the defendant builds the highway and bridge as contemplated the space under the bridge will be decreased approximately from 1,400 feet to 560 feet, and that the water and power plant of the town of Greenville will be injured and the lands of the other plaintiffs flooded. The defendant answered the complaint, and the motion of the plaintiffs to make permanent the temporary restraining order was heard upon the pleadings and upon affidavits filed by both parties. The trial judge found as facts, which are set forth in the judgment, that the lands of the plaintiffs are at times subject to overflow, and that the power plant of the town of Greenville is so situated that if the water of the river is ponded by dams or fills, it will probably be partially submerged and seriously injured; that in case of excessive rains the water rises in the river basin to such extent as to overflow the low grounds on the east side of the river; that there have been two floods within the last eighteen years which filled the lowgrounds of the river and caused the water to rise to the level of the railroad dam; that the defendant contemplates filling in a part of the roadway which will extend 560 feet farther in the direction of the bed of the stream; and that construction of the fill will not affect the flow of the water in the river bed at ordinary times.

It is contended by the defendant that the plaintiffs are not entitled to equitable relief and that they have ample redress under the law of eminent domain and by virtue of 3 C. S., 3846(bb).

Judge Grady being of this opinion dissolved the restraining order, and on the ground that the action is prosecuted solely for injunctive relief dismissed the action at the cost of the plaintiffs, and they excepted and appealed. In our opinion the judgment should be affirmed.

The defendant is engaged in a public enterprise. The purpose of the several statutes creating the State Highway Commission and defining its duties was to establish a system of highways for the State which should connect county-seats, principal towns, State parks, and principal State institutions, and should link up with State highways of adjoining States and with National highways into National forest reserves. 3 C. S., 3846(a) *et seq.* In determining the plaintiffs' asserted right to injunctive relief, we must not close our eyes to the probability of public inconvenience or loss. In *Griffin v. R. R.,* 150 N. C., 312, it was held that it is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources, and that such restraint should not be exercised except in extreme cases; and in *Staton v. R. R.,* 147 N. C., 428, that the courts never enjoin the construction or use of public utilities and improvements at the suit of private individuals unless the damage is both serious in amount and irreparable in character. The Court has also held that its equitable jurisdiction will not be exercised to stop the execution of a great enterprise when there is ample remedy either by the recovery of damages or by requiring the defendant to abate the injury by reducing the height of its dam—that is, when the damages are neither serious nor irreparable. *Rope Co. v. Aluminum Co.,* 165 N. C., 572; *Waste Co. v. R. R.,* 167 N. C., 340; *Jones v. Lassiter,* 169 N. C., 750; *R. R. v. Thompson,* 173 N. C., 258.

In the next place the anticipated injury is contingent and the Court will not act upon speculative proof or such as furnishes ground only for conjecture. *Dorsey v. Allen,* 85 N. C., 358; *Berger v. Smith,* 160 N. C., 212. Mere apprehension of an injury is not enough. It must appear that such apprehension is well grounded and that there is a reasonable probability of real injury for which there is no adequate remedy at law. 14 R. C. L., 354, sec. 57. True, the judgment recites as a fact the probability of injury; but in *Barnes v. Calhoun,* 37 N. C., 199, it is said that as a rule the court will exercise equitable jurisdiction only when the evil sought to be prevented is not merely probable, but undoubted. *Ellison v. Comrs.,* 58 N. C., 57; *Dorsey v. Allen, supra.* "The general rule is that an injunction will be denied in advance of the creation of an alleged nuisance when the act complained of may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual merely. That is the universal law in all the courts of this country." *Hickory v. R. R.,* 143 N. C., 451.

The judge held also that the plaintiff has an adequate remedy at law. It is apparent that the plaintiffs cannot maintain an action against the defendant for tort. *McKinney v. Highway Commission,* 192 N. C., 670; *Latham v. Highway Commission,* 191 N. C., 141. The State Highway Commission is an unincorporated agency of the State charged with the duty of exercising administrative and governmental functions and is not liable to suit for trespass or tort. The only remedy afforded the plaintiffs is statutory. *McKinney v. Highway Commission, supra.* The defendant concedes that the ponding of water on lands belonging to the plaintiffs would be a taking for public use within the law of eminent domain, and that the plaintiffs upon sufficient proof would be entitled to a recovery at their election of permanent damages. *Eller v. Greensboro,* 190 N. C., 715; *Ridley v. R. R.,* 118 N. C., 996, 1009. The judgment of the Superior Court is

Affirmed.

McCOY HOWARD, J. O. TYNDALL, HYMAN TYNDALL, E. S. JONES, J. N. JONES, J. D. HARPER, E. C. HOWARD, JIMMIE TYNDALL, J. B. HILL, N. V. NOBLE, AND P. G. NOBLE, ON BEHALF OF THEMSELVES, AND ALL OTHER CITIZENS AND TAXPAYERS OF PINE FOREST SCHOOL DISTRICT AND TAYLOR SCHOOL DISTRICT, AS WELL AS ON BEHALF OF ALL OTHER CITIZENS AND TAXPAYERS OF THE TERRITORY COMPRISING WHAT HAS HERETOFORE BEEN KNOWN AS THE PINK HILL, PINE FOREST AND TAYLOR SCHOOL DISTRICTS, IN LENOIR COUNTY, v. THE BOARD OF EDUCATION OF LENOIR COUNTY, A BODY CORPORATE, AND LENOIR COUNTY, A BODY POLITIC AND CORPORATE.

(Filed 24 October, 1928.)

Schools and School Districts—Consolidation of Districts—Power of County Board of Education—Discretion—Injunctions.

Where in the discretion of the county board of education in the exercise of good faith it is required for the best interest of a consolidated school district to sell certain property therein, and it appears that the district has been formed under the county-wide plan, equity will not grant injunctive relief.

APPEAL by plaintiffs from *Grady, J.*, at Chambers, 6 September, 1928. From LENOIR. Affirmed.

This is an action for injunction to restrain the board of education of Lenoir County from selling the school property of the Pine Forest School District and the Taylor School District, for levying a tax and for other relief.

The following judgment was rendered in the court below: "This cause coming on to be heard upon petition of the plaintiffs for an injunction restraining defendants from levying a tax in the Pink Hill Consolidated District and from selling the old school buildings in what were known as Pine Forest and Taylor districts, which form a part of said Consolidated District, and the court having heard the evidence offered by the parties; now, upon the pleadings and exhibits offered, the court being of opinion that the creation of said Consolidated District was lawful, and done in the exercise of the powers conferred upon the defendants by the laws of this State, and said action having been brought solely for injunctive relief, which the court denies, it is ordered and adjudged that this action be dismissed and that defendants go hence without day and recover their costs to be taxed by the clerk."

Plaintiffs assigned errors as follows:

"1. That the court erred in holding that upon the pleadings and exhibits offered in this cause, the creation of the Pink Hill Consolidated District was lawful, and done in the exercise of the powers conferred upon the board of education of Lenoir County.

"2. That the court erred in failing and refusing to hold, upon the whole record in this cause, that the proceedings of the defendant board of education, in reference to the so-called Pink Hill Consolidated District, were not in accordance with the county-wide plan of organization, and that said county-wide plan of organization was violated in reference to the proceedings taken to consolidate and tax the Pine Forest District and the Taylor District, as set forth in the record."

Cowper, Whitaker & Allen for plaintiffs.
Sutton & Greene for Board of Education of Lenoir County.

PER CURIAM. The present superintendent of public instruction of Lenoir County, N. C., has held that position since 1 November, 1920. Cooperating with the board of education of Lenoir County, after mature consideration, a comprehensive county-wide plan for rural and urban schools in Lenoir County was determined upon, which involved the consolidation of the small districts into larger districts so that better classification and graduation of pupils and more efficient instruction on the part of the teachers could be had, and that proper high school facilities could be more economically provided.

The State Department of Education was requested to make a complete comprehensive survey. The survey was made under the State Supervisor of Rural Schools, with competent assistants. The results of this survey are set forth in Educational Publication No. 73, published by the State Superintendent of Public Instruction in the year 1924, under the title "Survey of the Public Schools of Lenoir County." That as soon as the plan therein set forth began to take definite shape it was determined that it should embrace the establishment of three standard high schools in the county, one at Kinston, one at LaGrange and one at Pink Hill, the Pink Hill Consolidated District to embrace all the territory in Pink Hill Township. The Pink Hill school and this plan has always included the *Pine Forest* and *Taylor districts* as a part of the Pink Hill Consolidated District. When this survey was being made, it covered a period from 1 December, 1921, to some time in the spring of 1923. The survey was published in 1924, contains 233 pages and it is claimed to be the most complete, instructive and far-reaching rural and urban survey ever made in the nation, and a model to be followed. It gives photographs of the groups of the old schoolhouses and the photographs of the proposed new consolidated schoolhouses in lieu of the group of old ones. It gives two maps of the "School Consolidation Survey," one showing the location of the old schools and the other the new consolidated schools. In this survey the *Pink Hill Consolidated School District* includes *Pine Forest* and *Taylor districts.*

It was contended by defendant board of education that the plan was adopted according to law and every step taken was legal and everything done that was required to be done by law, and legal notice in all matters duly given. That all the consolidated schoolhouses have been built and the Pink Hill Consolidated School District is the last in the group. That it took years to gradually consolidate, and the consolidated plan was at all times binding, but in abeyance until it could be reached under the plan, when funds became available for the purpose and other essential conditions would permit. That at the present time the conditions in reference to the Pink Hill Consolidated School are as follows:

"Teachers: Thirteen, with possibly an additional teacher of music; eleven grades, full high-school instruction.

"Grounds: Four acres; condition of school grounds very good.

"Building: Value $47,000; 15 class rooms and auditorium; electric lights arranged in a modern manner; running water; modern toilet facilities; sanitary conditions good.

"Equipment: Single desks of modern design; modern blackboards; good library; laboratory; home economics and agriculture equipment."

That besides the physical facilities which the board is able to furnish at Pink Hill, which cannot be afforded at the Pine Forest and Taylor schools, much better teachers can be secured for the Pink Hill school than for the others on account of more desirable working conditions and more attractive living conditions, so that a much higher grade of instruction can be provided by the board in the Pink Hill school than in either the Pine Forest or Taylor schools; and the board of education of Lenoir County has felt all the while, and still feels, that the interests of the children of the Pine Forest and Taylor districts are highly promoted by the action it has taken in the consolidation of districts.

That the law imposes upon this defendant board the duty of providing educational facilities for the children of said districts, and this duty it has attempted to discharge so as to be of the greatest benefit to the children in the districts.

That the Duplin County arrangement was legal, and when that county withdrew the board carried out the consolidated plan in regard to Pink Hill Consolidated School District, which it always intended to do. That the location of the Pink Hill Consolidated School District is about the center of population, and adequate transportation arrangements to carry the children will be provided; that if the arrangement with Duplin County was illegal, and if there is anything incompatible between the county-wide system and an inter-county school, the fact that the inter-county school has been abandoned ought not to be a ground of objection to putting the county-wide system into operation; that the cessation of allegedly unlawful acts should not be urged as the basis of equitable relief. The plaintiffs contend to the contrary.

We think all that the board of education has done in the premises is a substantial compliance with the statutes in such cases made and provided and decisions of this Court on the subject. We have carefully read the record and able brief of plaintiffs' counsel and can find no reason for disturbing the judgment of the court below. We find no new or novel proposition of law involved. It may be a hardship on plaintiffs to send their children a longer distance, but the facilities for better educational advantages, no doubt, will be greatly promoted. But this is left, under the law, to the sound discretion of the board of education. The record discloses that the plaintiffs are good, law-abiding citizens, interested in education. Under the facts disclosed by the record, we cannot interfere in the board of education's discretion. The judgment below is

Affirmed.

FEDERAL FINANCE AND CREDIT COMPANY v. MARSHALL TEETER.

(Filed 24 October, 1928.)

1. **Replevin—Parties—Surety—Claim and Delivery.**

   The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action.

2. **Trial—Instructions—Harmless Error.**

   Where but one inference of fact can be drawn from all the evidence in the case, and the jury has accordingly so answered the issue, an erroneous instruction thereon is not reversible error.

APPEAL by defendant from *Bond, J.*, and a jury, at March Term, 1928, of DURHAM. No error.

The issue submitted to the jury and the answer thereto were as follows: "What damage, if any, has the plaintiff sustained on account of the wrongful detention of said automobile by the defendant since the issuance of claim and delivery herein? Answer: $574, with interest."

R. H. Sykes and R. P. Reade for plaintiff.
Hartsell & Hartsell for defendant.

PER CURIAM. This was a civil action brought by plaintiff to recover balance due on an automobile with the ancillary remedy of claim and delivery for said automobile, the same being replevied by the defendant upon the giving of a bond in the sum of twelve hundred dollars ($1,200).

The *first* question: "Can all the questions involved in an action, including the liability of the surety on replevin bond, be settled in one suit rather than bringing separate and independent actions?"

We think so, under our liberal practice. The defendant gave an undertaking "with damages for the deterioration and detention."

In *Moore v. Edwards,* 192 N. C., at p. 448, it was said: "We can find no statutory provision prohibiting separate actions in a case of this kind. *It is no doubt better practice to try out the entire controversy in one action.*" See *Polson v. Strickland,* 193 N. C., 299; *Crump v. Love,* 193 N. C., 464.

Second. "Where, from all the evidence before the court the jury can draw but one inference, will a new trial be granted on account of error in the charge of the trial judge?"

When the replevy bond was given by defendant, it was for $1,200 (C. S., 836), "to the effect that they are bound in double the value of the property." So, when the property was replevied and taken by defendant, it was valued at $600. Defendant kept the car for some eighteen months and it was returned to plaintiff. All of the evidence was to the effect that it was in bad condition, and when sold at public auction, after notice, a large crowd being present, it only brought $26.

One of the witnesses testified: "It brought as much or more than it was worth." Another testified: "I have had experience in selling second-hand automobiles as an auctioneer. I think the car brought all it was worth at that time."

It will be noted that the jury deducted the $26, the amount the automobile sold for, from the $600, and their verdict was for $574. The jury were warranted on all the evidence to return the verdict they did. The charge on the measure of damage, although erroneous, was harmless.

No error.

MARY P. BELL v. MURCHISON NATIONAL BANK.

(Filed 31 October, 1928.)

1. **Equity—Bill of Discovery—Examination of Adverse Party.**

An application for an order for the examination of an adverse party under C. S., 901, must contain positive averments, and must not be argumentative, and mere statements that the examination is necessary and material is not sufficient, but the statute will not be construed so as to preclude an examination of an adverse party when the affidavit shows good faith, necessity, and materiality, and where it is alleged that the necessary information cannot be had from any person except the adverse party because all other persons with such information are outside the jurisdiction, the application is sufficient, and an order based thereon will be upheld.

2. **Same—Inspection of Writings.**

While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld.

3. **Bills and Notes—Checks—Rights and Liabilities of Drawee Bank—Endorsement.**

A drawee bank of a check of its depositor is not liable in damages on the ground that the check had been paid by it without endorsement of the payee when it appears that the check had been paid and the proceeds applied to a debt for the payment of which it had been issued, and when the evidence is conflicting thereon the question is for the jury under proper instructions.

APPEAL by plaintiff from *Stack, J.,* at April Term, 1928, of NEW HANOVER.

Plaintiff brought suit to recover damages for the alleged negligence of the defendant in paying a check drawn on it by the plaintiff and not endorsed by the payee.

On 30 October, 1925, the plaintiff had on deposit with the defendant subject to her order the sum of $4,496.39 as a commercial or checking account, and on this date she drew a check on the defendant for $4,250, payable to the order of the Mizner Development Company, organized and doing business in the State of Florida with its principal office in the city of Miami, and forwarded said check to the payee by mail. Some time after 12 November, 1925, the check was presented to the defendant for payment by the Barnett National Bank of Jacksonville, Fla., the check at this time bearing an endorsement for deposit by Boca Raton Resales Corporation, Miami Bank and Trust Company, and the Barnet National Bank, previous endorsements having been guaranteed by the two last named banks. When the check was presented to the defendant for payment the Mizner Development Company, payee, had not endorsed it and its name appeared on the check only as payee. The plaintiff alleged that the defendant had negligently paid the check without the payee's endorsement and that she was entitled to the recovery of damages for the defendant's negligent failure to perform its duty in seeing that the check had been properly endorsed.

The defendant filed an answer alleging that in pursuance of a uniform custom among banks it relied upon the endorsement of the banks through which said check had passed and made payment of the check in good faith; that although the check had been canceled and returned to the plaintiff on or about 1 December, 1925, plaintiff did not call the attention of the defendant to the fact that the check had not been endorsed by the payee until 10 May, 1926; that the Boca Raton Resales Corporation was an agency or branch of the Mizner Development Company, the two having offices in the same building and interlocking officers and employees and that the two corporations were to all intents and purposes one organization. The defendant further alleged that the plaintiff had entered into negotiations with these two corporations for the purchase of a certain lot in Boca Raton, Fla., at the price of $15,000 and had agreed to make payment as follows: $750 cash; $4,250 in 30 days; $2,500 four months after date, evidenced by a note, and the remainder in quarterly installments of $750 each; that on 9 October, 1925, the plaintiff issued her check to the Mizner Development Company for $750 and executed her promissory note for $2,500 payable to Boca Raton Resales Corporation, and afterwards forwarded to the Mizner Development Company her check for $4,250, which is the subject of the present action. It was alleged that the check for $750 bore the endorsement of the Boca Raton Resales Corporation, and that all negotiations had been conducted indiscriminately with both corporations, and that the Resales Corporation had conducted practically the whole of the transaction. Other defenses were set up in the answer to which it is not necessary more particularly to refer. The court submitted to the jury the following issue: "In what amount, if anything, is the defendant indebted to the plaintiff?" The answer to the issue being "Nothing," judgment was rendered in favor of the defendant and the plaintiff excepted and appealed upon assignments of error.

K. O. Burgwin and Marsden Bellamy for plaintiff.
Varser, Lawrence, Procter & McIntyre for defendant.

ADAMS, J. The defendant applied for an order to require the plaintiff to appear before the clerk of the Superior Court and to submit to an examination before trial as provided in section 901 of Consolidated Statutes. The order was made and the plaintiff was examined before a commissioner, but when the defendant offered the examination in evidence the plaintiff objected to its introduction on the ground that the affidavit was not sufficient to support the order. This Court has held that the application for an order of examination should be under oath, should set forth the nature of the action, and should aver that the desired information is not accessible to the applicant and that the examination is material and necessary; also that the application must be made in good faith and must not be perverted from its lawful purpose into a means of harassing or oppressing the opposing party under the guise of a fair examination. *Chesson v. Bank,* 190 N. C., 187; *Bailey v. Matthews,* 156 N. C., 78.

The two objections urged by the plaintiff are that the affidavit does not show that the examination was necessary and material and does not set forth with particularity any papers or documents claimed to be essential to the defense.

The mere statement that an examination is necessary and material is not sufficient; the averments must be positive, and not argumentative. *Evans v. R. R.,* 167 N. C., 415; *Mica Co. v. Express Co.,* 182 N. C., 669. The defendant's affidavit is not subject to either of these two objections. It alleges that it is impossible for the defendant to get the necessary information from any person except the plaintiff because all other persons who have such information are not accessible to the defendant and are not within the jurisdiction of the court. The construction of section 901 should not be so limited or circumscribed as to preclude the examination of an adverse party when the affidavit shows good faith and the necessity and materiality of the desired information. *Smith v. Wooding,* 177 N. C., 547; *Whitehurst v. Hinton,* 184 N. C., 12.

As to the second objection it may be said that while a "roving commission for the inspection of papers" will not ordinarily be allowed, the defendant's affidavit referred to papers which were under the exclusive control of the plaintiff, which related to the immediate issue in controversy, and which manifestly could not be definitely described or particularly set forth. *R. R. v. Power Co.,* 180 N. C., 422; *LeRoy v. Saliba, ibid.,* 16.

The first assignment of error is without merit, the second and third are abandoned, and the fourth involves a hypothesis as well as the assumption that it was the defendant's legal duty to notify the plaintiff of nonendorsement by the payee. The proposed testimony which is the subject of the fifth in part at least essentially rests upon hearsay; and the sixth, if sustained, would be equivalent to permitting the witness to interpret the alleged contract.

One of the principal controversies between the parties was whether the Mizner Development Company and the Boca Raton Resales Corporation were substantially one organization, or, if different organizations, whether they conducted a joint enterprise. The jury were instructed that as the defendant admitted that it had paid the check without the payee's endorsement, it must bear the burden of satisfying the jury that the payee had received the proceeds of the check or that the proceeds had been applied as the plaintiff intended; and that if the bank had paid the check without proper endorsement and had satisfied the jury by the greater weight of the evidence that the proceeds had been paid to the Mizner Company and had been applied as a credit on the purchase price, the plaintiff could not recover because she admitted that the check had been drawn as part payment of the price agreed on. *McKaughan v. Trust Co.,* 182 N. C., 543; *Dawson v. Bank, ante,* 134; 7 C. J., 686, sec. 414. The plaintiff concedes that this instruction is correct as an abstract proposition, but contends that there was no evidence on which it could be sustained. Upon inspection of the record, however, we are satisfied that there was evidence on this question which it would have been improper to withhold from the jury. On 20 May, 1927, the plaintiff brought suit in Florida against the Mizner Development Company and alleged that it had received the check for $4,250, and had afterwards obtained the proceeds therefrom. It is contended by the plaintiff that she had not discovered the facts in regard to the transaction at the time the suit was instituted in the Florida court, but this was merely a circumstance to be considered by the jury in connection with other evidence. There was evidence tending to show that the proceeds of the check had been applied as they would have been applied if the check had been endorsed by the Mizner Company, and that the plaintiff had made one of her checks payable to the Mizner Development Company and Boca Raton Resales Company, and that it had been endorsed only by the Mizner Development Company. The seventh and eighth assignments must therefore be overruled.

The thirteenth and eighteenth exceptions relate to the contentions which were not called to the attention of the court at the time and in the instruction which is the subject of the nineteenth exception we find no error. The other exceptions require no discussion.

No error.

A. J. COLLINS v. W. M. VANDIFORD.

(Filed 31 October, 1928.)

1. **Evidence—Burden of Proof.**

The correct rule of law as to the burden of proof is a matter of substantial right to the party who has been prejudiced thereby.

2. **Same.**

In an action to recover upon a note secured by a title retaining contract of sale, where the defense is that the amount was raised after execution and delivery, the burden is on the defendant to show this by the greater weight of the evidence, and a charge is erroneous that he must prove his defense by clear, strong and convincing proof, or find the issue for the plaintiff, as placing on defendant a greater burden than the law requires of him.

3. Appeal and Error—Review—Harmless Error—Instructions.

Where the charge of the court is erroneous in favor of the plaintiff, it will not be held for reversible error on his appeal.

APPEAL by plaintiff from *Harris, J.*, at February Term, 1928, of CRAVEN. No error.

The issue submitted to the jury and their answer thereto was as follows: "In what amount, if any, is the defendant indebted to the plaintiff? Answer: Nothing."

McKinnon Carmichael for plaintiff.
D. L. Ward for defendant.

CLARKSON, J. This is a civil action to recover $100, alleged to be due on a note (conditional sale agreement) made by defendant to plaintiff on purchase of a Ford truck. Defendant denied liability and alleged: "That after the said conditional sale agreement and buyer's statement had been executed and delivered to the plaintiff, the purchase price of $350 was wrongfully, falsely and fraudulently changed and altered to $450, with intent to defraud the defendant to the amount of $100 in excess of the purchase price which he agreed to pay."

After stating the contentions clearly and fairly, the court below charged the jury as follows: "There is one issue for you to pass upon, gentlemen, in determining this case: 'In what amount, if any, is the defendant indebted to the plaintiff?' That is, in what amount, if any, is W. M. Vandiford indebted to the plaintiff, A. J. Collins, Vandiford being the defendant, and Collins the plaintiff. Now, the burden of that issue, gentlemen, is on the plaintiff, Mr. Collins, and he is indebted either $100 and interest or nothing. . . . Now, as to this paper being changed, the allegation of the defendant that the figures were changed in this paper after he signed it, the court charges you that before you can find that these figures were changed that you must be satisfied from evidence which is *clear, strong and convincing.* The rule is that a written paper stands for itself, and before you can find that any part of that paper has been forged, altered, or added to, that whoever says that must show you from the evidence that it is *clear, strong and convincing* that that has been done, and unless he has shown you it would be your duty to find that the paper was not changed. Now, gentlemen, the court charges you, if you find from the evidence which is *clear, strong and convincing* to you that this paper was changed from $350 to $450, it would be your duty to answer this issue 'No.'. But the court further charges you, if you find that this paper was not changed, and the defendant having admitted the execution, it would be your duty to answer the issue $100."

The plaintiff complains that the charge was contrary to law; that when the plaintiff proved the execution of the note the burden of showing payment was on the defendant. This is ordinarily so. *Guano Co. v. Marks,* 135 N. C., 59; *Swan v. Carawan,* 168 N. C., 472; *Bank v. Clark,* 172 N. C., 268.

From the pleadings the $100 was a part of the alleged purchase price of the Ford truck for $450 (including extras making $491). There was no dispute that $350 and the extras had been paid by defendant. The contention of the defendant was to the effect that the $350 was fraudulently raised to $450. The case in the court below was tried out on the theory that the conditional sales agreement was raised from $350 to $450. On this aspect the court charged: "Now, gentlemen, the court charges you, if you find from evidence which is *clear, strong and convincing* to you that this paper was changed from $350 to $450, it would be your duty to answer this issue, No. But the court further charges you, if you find that this paper was not changed, and the defendant having admitted the execution, it would be your duty to answer the issue $100."

We think plaintiff cannot complain. The court below laid down the rule stronger in favor of plaintiff, and against defendant, than he was entitled to. Defendant was only required to satisfy the jury *"by the greater weight of the evidence." Wicker v. Jones,* 159 N. C., at p. 113.

The prior part of the charge, if error, was not prejudicial, as the court below correctly charged, "the defendant having admitted the execution, it would be your duty to answer the issue $100." The note was interwoven with the conditional sales agreement, which it was alleged was raised from $350 to $450. It has long been held in this jurisdiction that the burden of proof is a material rule and a substantial right. *Hunt v. Eure,* 189 N. C., 482.

Under the facts and circumstances of this case we cannot hold, on the entire charge, that there was prejudicial error. The jury could have readily decided otherwise, but they are the triers of fact.

No error.

STATE v. JETHRO R. VICKERS.

(Filed 31 October, 1928.)

1. **Husband and Wife—Abandonment—Judgments—Discretion of Court—Parent and Child.**

   It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of wilfully abandoning them

(C. S., 4447, 4449), and, *Held,* in this case an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars come within the provisions of the statute.

2. Same—Form and Sufficiency of Judgment.

Where the husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the Superior Court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court.

3. Criminal Law—Judgments—Conditional or Alternative Judgments.

Where the husband has been convicted of wilfully abandoning his wife and minor children (C. S., 4447); and, secondly, of wilfully failing to support them (C. S., 4450), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under the first one, is not objectionable as being conditional or alternative.

APPEAL by defendant from *Small, J.,* at May Term, 1928, of DURHAM.

The defendant was indicted for the wilful abandonment of his wife and children under C. S., 4447, and for his wilful failure, while living with his wife, to provide adequate support for her and the children under C. S., 4450. On the trial at the conclusion of the evidence the defendant pleaded guilty to both counts, and it was thereupon adjudged on the count for abandonment that the defendant pay into the office of the clerk of the Superior Court of Durham County on the first day of each calendar month, beginning 1 June, 1928, the sum of $90 for the support and maintenance of his wife and two minor children, and that he give bond in the sum of $1,000 with sufficient surety conditioned upon his faithful compliance with this order, and that in default he pay the penal sum of the bond into the office of the clerk to be disbursed upon the order of the Superior Court.

On the second count it was adjudged that the defendant be confined in the common jail of Durham County for a period of two years and assigned to work on the public roads of the county, *capais* not to issue unless the defendant failed to pay into the office of the clerk the sum of $90 each month as provided in the judgment and failed to pay the costs or failed to deliver his two minor children into the custody of their mother. Defendant excepted to the judgment and appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for plaintiff.

J. W. Barbee and V. S. Bryant for defendant.

ADAMS, J. It is provided by statute that upon any conviction for abandonment the judge having jurisdiction may, in his discretion, make such order as in his judgment will best provide for the support of the deserted wife and children from the property or labor of the defendant. C. S., 4449. It was by virtue of this authority that the trial court adjudged that the defendant should pay into the office of the clerk a stated sum at the beginning of each month and should secure compliance with the order by the execution of a penal bond in the sum of $1,000. The defendant contends that the period or term of payment is indefinite; that the judgment is conditional or alternative, and that the custody of the children was not an issue before the court. We do not concur in the position that the sentence is conditional or alternative as in *S. v. Perkins,* 82 N. C., 682, or that the judgment was suspended in accordance with the principle laid down in *S. v. Hardin,* 183 N. C., 815, and in previous decisions. The effect of the last paragraph in the judgment was merely to suspend the execution in case of compliance by the defendant with certain conditions. *S. v. Schlichter,* 194 N. C., 277; *S. v. McAfee,* 189 N. C., 320; *S. v. Vickers,* 184 N. C., 676.

We are of opinion, however, that the judgment is indefinite in certain of its terms. It was argued on behalf of the State that the act of 1925 (Public Laws, ch. 290), which provides that the abandonment of children by the father shall constitute a continuing offense and shall not be barred until the youngest living child shall arrive at the age of 18 years, is in effect a suspended execution as to the minor children for a definite period of time. On the other hand it is contended that if this be admitted the judgment provides for the payment of $90 monthly for an indefinite period, and that after the children may have reached the age of 18 years the defendant would still be compelled to pay to his wife the entire sum, a portion of which was manifestly intended for the support of the children. The defendant contends that the judgment is subject to the further objection that a penal bond in the sum of $1,000 is required without any definite order for the disbursement of the penalty in case of a breach, and that the last paragraph of the judgment is susceptible of the interpretation that the defendant will be subject to imprisonment in case of his failure to make the monthly payments although the penalty of the bond has been paid into the office of the clerk.

The judgment should be more definite both as to the time of payment and as to the amount which the wife should be entitled to in case the allowance is no longer applicable to the support of the children. The cause is therefore remanded to the end that the terms of the order made pursuant to section 4449 be more definitely prescribed and set forth in the judgment.

Remanded.

JAMES D. PARKER, COMMISSIONER, MARTI BASS, ADMINISTRATRIX OF W. H. BASS, DECEASED, v. L. J. R. DICKINSON.

(Filed 31 October, 1928.)

1. **Partition—Actions for Partition—Operation of Decree of Confirmation.**

While a tenant in common does not acquire title to lands in a proceeding for actual partition until confirmation of the partition by the court, the subsequent confirmation by the court relates back to the time of the partition, and the title vests in the tenant in common as of that time, and when the tenant in common dies between the time of the partition and the confirmation by the court, his administratrix by proper proceedings may sell the lands to make assets to pay his debts.

2. **Executors and Administrators—Sales and Conveyances Under Order of Court—Application and Order.**

In proceedings to sell lands of decedent to make assets to pay debts, the question of the necessity to sell all of decedent's land becomes immaterial and academic as affecting the title of the purchaser at the sale when all the parties in interest have joined in the request that all of the lands be sold.

CIVIL ACTION, before *Daniels, J.* From JOHNSTON.

W. H. Bass died 6 June, 1926, leaving a last will and testament. Marti Bass, widow of the deceased, duly qualified as administratrix of his estate and duly instituted a special proceeding to sell land owned by the decedent for the purpose of making assets to pay the indebtedness of the estate. The record discloses that in the special proceeding all persons having an interest in the estate were made parties and answers were filed by parties in interest denying the amount of indebtedness alleged in the petition, but admitting that certain indebtedness was due, and that the personal property of the decedent had been properly applied. The parties further joined in the prayer for a sale of the property. A part of the land embraced in the petition for sale for assets was derived by the decedent, W. H. Bass, from the division of the land of his brother, Gray Bass. Partition proceedings for such division were duly conducted and the commissioners made their report on 2 June, 1926. The decree of confirmation of such partition was duly made more than twenty days after the filing of said report. In the meantime W. H.

Bass died, that is to say W. H. Bass died after the report of the commissioners had been submitted and before the confirmation thereof.

The contention was made that the Gray Bass division could not be included as a part of the property owned by W. H. Bass at the time of his death for the reason that no confirmation of the report of the commissioners had been made until after the death of said W. H. Bass. In the proceeding by Marti Bass, administratrix of W. H. Bass, the land of W. H. Bass, including the portion which his estate received from the estate of his brother, Gray Bass, was duly sold and purchased by the defendant. The plaintiff, as commissioner in said proceeding, tendered deed to the defendant, who declined to accept it, and this action was thereupon instituted.

The defendant contends that title to that part of the land of W. H. Bass, allotted to W. H. Bass in the partition of the Gray Bass lands, is defective for the reason that no decree of confirmation was made until after the death of W. H. Bass.

A controversy upon an agreed statement of facts was submitted to Daniels, J., who ruled that the deed tendered by plaintiff to defendant conveyed "a good and indefeasible fee-simple title to the lands described in said deed."

Parker & Martin for plaintiff.
Dickinson & Freeman for defendant.

BROGDEN, J. Does confirmation of a sale or of an actual partition take effect upon the date of confirmation or at the date of the sale?

Until a judicial sale has been confirmed the purchaser is a mere preferred proposer. Confirmation is an act of consent and approval which the court gives to the sale, and, for all practical purposes the court is the vendor in such cases, and within the limitations prescribed by law, may give or withhold its consent in its discretion. *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232. However, when the transaction is completed by confirmation, and thereupon title is conveyed to the purchaser, confirmation relates back to the day of the sale and the purchaser receives his title as of that time. *Farmer v. Daniel,* 82 N. C., 152; *McArtan v. McLaughlin,* 88 N. C., 391; *Vass v. Arrington,* 89 N. C., 10; *Joyner v. Futrell,* 136 N. C., 301, 48 S. E., 649.

Incidentally, it was contended that a sale of all the tracts of land described in the petition was not necessary to pay debts. In proper cases this contention would perhaps be worthy of serious consideration, but in the case at bar all the parties requested that all the land described in the petition be sold. Hence a discussion of the question would be wholly academic.

Affirmed.

J. W. GODWIN v. A. F. KENNEDY.

(Filed 31 October, 1928.)

1. **Agriculture—Fertilizers—Damages from Use of Inferior Fertilizer—Evidence—Statutes.**

   While the certificate of the State Chemist showing an analysis of fertilizer is made prima facie evidence of the constituency of the fertilizer under C. S., 4697, such certificate is not admissible unless the samples of fertilizer are taken in accordance with the statute, but when objection to the admission of such certificate is withdrawn, error in its admission, if any, is cured, and *Held*, under the facts of this case, there was sufficient evidence of damage to crops from the use of such fertilizer to be submitted to the jury.

2. **Trial—Reception of Evidence—Objections and Exceptions.**

   Where objection to the admission of evidence is withdrawn during the trial, error, if any in its admission, is cured thereby.

3. **Pleadings—Counterclaim—When Counterclaim May be Set Up.**

   Damages for an alleged assault by an officer in taking goods under claim and delivery or false arrest by him, cannot be maintained as a counterclaim in an action upon a note given by the defendant to the plaintiff for fertilizer sold to him, as it does not arise out of, and is not connected with the subject-matter of the action, and does not accrue until after the commencement of the main action. C. S., 519, 521.

CONNOR, J., dissenting.

APPEAL by defendant from *Daniels, J.*, at April Term, 1928, of BERTIE.

Civil action to recover on a promissory note given for fertilizer warranted to be of high grade and expressly prepared for use in the cultivation of tobacco.

Defense was interposed on the ground of alleged failure of consideration; and a counterclaim was set up for loss of crops. A further counterclaim for assault and false arrest on the part of the officer who served the claim and delivery papers in this action was also pleaded.

Defendant offered two certificates of chemical analyses, one made by Robb & Arnold, of Richmond, Va., and the other by W. G. Haywood, Fertilizer Chemist, North Carolina Department of Agriculture, Division of Chemistry, both showing deficiency of ingredients in the fertilizer, which were at first excluded on plaintiff's objection, but later admitted on objection being withdrawn. Notwithstanding this evidence, the court held that the analyses were not made as required by the statute, hence he declined to submit an issue on defendant's counterclaim for loss of crops, and instructed the jury that the chemical analyses could only be considered on the question of alleged want of consideration. There was no issue submitted as to the alleged assault and false arrest by the officer who served claim and delivery papers in the present action.

From a judgment in favor of plaintiff for the amount of the note the defendant appeals, assigning errors.

W. R. Johnson and Craig & Pritchard for plaintiff.
Winston, Matthews & Kenney for defendant.

STACY, C. J., after stating the case: We think the trial court erred in limiting the use of the chemical analysis, made by the State Chemist, to evidence tending to show want of consideration. *Fertilizer Co. v. Thomas,* 181 N. C., 274, 106 S. E., 835. True, it is provided by C. S., 4697, that "no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients" (unless other facts appear, not now pertinent), and when such analysis is had in accordance with the provisions of the statute, the certificate of the State Chemist, setting out the analysis, is made prima facie proof of the constituency of said fertilizer as shown thereby. But here, there was a certificate of the State Chemist, showing deficiency of ingredients of the fertilizer, in evidence without objection, hence it would seem that defendant was entitled to have his counterclaim for loss of crops submitted to the jury. *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141. We are not now required to say whether the analysis made by the Richmond firm of chemists is competent as evidence on this phase of the case. Nor is the preliminary question as to whether the provisions of the statute were complied with, which go to the competency of the certificate of the State Chemist as prima facie proof of the constituency of the fertilizer, presented on this appeal, as the certificate was admitted without objection.

There was no error, however, in declining to submit an issue as to the alleged assault and false arrest by the officer who served the claim and delivery papers issued in the present action, for the very good reason, among others, that the alleged cause of action, set up herein as a counterclaim, did not arise out of, nor is it connected with, the subject-matter of plaintiff's claim, and it did not accrue until after the institution of the present suit. C. S., 519 and 521; *Phipps v. Wilson,* 125 N. C., 106, 34 S. E., 227; *Sewing Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14; *Smith v. French,* 141 N. C., 1, 53 S. E., 435. See, also, *Williams v. Perkins,* 192 N. C., 175, 134 S. E., 417.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

CONNOR, J., dissenting: Defendant offered in evidence a paper-writing purporting to be a certificate showing the results of an analysis of samples of fertilizer made by the Fertilizer Chemist of the North Carolina Department of Agriculture. Plaintiff objected. There was evidence tending to show that samples of the fertilizer delivered by plaintiff to defendant were sent by defendant to the North Carolina Department of Agriculture for analysis. There was no evidence that these samples had been taken from the bags in accordance with the requirements of the statute. C. S., 4697. The court reserved its ruling upon plaintiff's objection to the certificate. Later during the trial plaintiff withdrew his objection to the certificate and agreed that same should be admitted as evidence.

The court, in the charge to the jury, limited this certificate as evidence upon the issue involving the contention of defendant that there was no consideration for the note sued on, for that the fertilizer delivered was not the fertilizer sold. The court was of opinion, and so held, that in the absence of evidence of an analysis of the fertilizer, made in accordance with the requirements of the statute, showing deficiency of ingredients, defendant could not recover on his counterclaim for damages to his crops resulting from the use of fertilizer. The certificate admitted as evidence, without objection, was competent to show the results of an analysis made by the State Chemist; but in the absence of evidence tending to show that this analysis was made as required by the statute, I am of the opinion that there was no error in the instruction of the court, or in its holding that there can be no recovery in this action by defendant of damages from results of use of fertilizer. See proviso in C. S., 4697. *Swift v. Aydlett,* 192 N. C., 330, 135 S. E., 141. I think the judgment should be affirmed.

STATE v. HANNAH GOLDEN.

(Filed 31 October, 1928.)

Appeal and Error—Review—Burden of Showing Error.

Where on appeal the Supreme Court is equally divided, one JUSTICE being absent, the appellant having failed to show error, the judgment of the lower court is affirmed.

APPEAL by defendant from *Shaw, J.,* at March Term, 1928, of FORSYTH. Affirmed.

Criminal action, in which defendant was tried upon a warrant charging her with unlawful possession of intoxicating liquor.

From judgment on a verdict of guilty, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John D. Slawter for defendant.

PER CURIAM. On her appeal to this Court, defendant relies solely upon her exception to the refusal of the trial court to allow her motion, at the close of all the evidence, for judgment as of nonsuit. C. S., 4643. There was evidence tending to show the presence of intoxicating liquor in the house occupied by defendant, as charged in the warrant. The controversy was as to whether the liquor was in her possession or in the possession of men to whom she had rented rooms, and who were present when the officers entered the house.

Stacy, C. J., not present, the Court, after hearing the argument, and after considering the question presented by the appeal is evenly divided, two of its members being of the opinion that there was no error in the refusal of defendant's motion, and two of the contrary opinion.

The defendant having failed to sustain her assignment of error, on her appeal to this Court, the judgment of the Superior Court must be affirmed. *Poe v. Durham Public Service Co.,* 192 N. C., 819.

Affirmed.

L. J. BROWN v. J. E. WILLIAMS, EXECUTOR OF THE WILL OF A. F. WILLIAMS, SR., DECEASED.

(Filed 7 November, 1928.)

1. **Executors and Administrators—Allowance and Payment of Claims—Claims Against Decedent for Services Rendered—Contracts.**

In order to a valid contract it is required by law that the minds of the contracting parties come definitely together upon its subject-matter; and when one unrelated to the testator brings action against the executor of the testator to recover for services rendered under an express contract, evidence of such contract is insufficient to be submitted to the jury that tends only to show that testator had expressed to third persons his intention to leave the plaintiff by will an amount in value or money that would more than repay him for the services he had rendered.

2. **Same—Quasi-Contracts—Quantum Meruit.**

While services performed by members of the decedent's family by certain of its members are ordinarily presumed to have been given gratuitously, and therefore an action against the personal representative upon a *quantum meruit* may not be maintained, it is otherwise when the plaintiff in the action is unrelated to the decedent, and the law will imply a promise to pay for the value of such services when a definite compensation has not been fixed by contract between the parties.

3. Same.

In proper instances one performing valuable services to the deceased may recover for their value for three years preceding his death upon a *quantum meruit.*

CONNOR, J., not sitting.

APPEAL by defendant from *Harris, J.*, and a jury, at March Term, 1928, of DUPLIN. New trial.

The plaintiff complains and alleges: (1) In the original complaint: That he was no relation to A. F. Williams, defendant's testator, but from about 19 April, 1923, to 19 April, 1926, three years prior to the death of A. F. Williams, he rendered valuable services to said A. F. Williams, setting them forth in detail, and they were reasonably worth $45 a month, totaling $1,620; that the services were rendered at his request and for his benefit and accepted by him. (2) In the amended complaint, that he rendered valuable services, setting them forth in detail, to said A. F. Williams, from 16 December, 1919, continuously up to the date of the death of A. F. Williams 19 April, 1926, a period of six years and four months, reasonably worth and totaling $4,620; that the said A. F. Williams, while said services were being performed, and he was receiving the use, benefit and comfort of the plaintiff's constant work and labor, contracted and agreed with the plaintiff that at his, the said A. F. Williams' death, he would leave the plaintiff well provided for, and would more than repay plaintiff for said services, and would give him something that the plaintiff would be proud of, and the plaintiff, relying upon the said promises of the said A. F. Williams to thus pay plaintiff for all his work and labor, as above set out, continued to do the same till the death of the said A. F. Williams, and he never received anything therefor from said A. F. Williams, substantially alleging an express contract to make testamentary provision. This was denied by defendant.

The evidence bearing on the express contract to make testamentary provision is as follows: Evidence of the different witnesses: "*He said that if it were not for Luther* (speaking of plaintiff), *he didn't know what he would do; that Luther was his dependence, and he would have to reward him for it. He didn't say how he was going to reward him.* . . . He said he was going to reward Luther for his help." . . . "*He told me he was going to give him something he would be proud of and appreciate when he was gone.*" . . . "He said 'Luther is my main help and my aim is to give him something *that will reward him when I am dead and gone.*' And he said 'Luther has done more for me than my own children, and I appreciate everything you all have done for me, and your little children are so sweet to run in here and pump my water.' . . . He said 'I am going to reward Luther with something *he will be proud of and appreciate when I am dead and gone.'* " None of these statements were made in the presence of plaintiff, and they were made at intervals and mostly during the last years of A. F. Williams' life.

Plaintiff lived with his father, who rented from A. F. Williams a farm of some 60 acres, about 150 to 200 yards from the Williams home. A. F. Williams and his wife practically lived alone. They were both, during the period, in declining health, and both died at the age of about 80 years. Mr. Williams died 20 April, 1926, and Mrs. Williams 20 June, 1926.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the plaintiff, L. J. Brown, and the defendant's testator, A. F. Williams, enter into the contract alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff, L. J. Brown, perform services and do work and labor for said A. F. Williams, under said contract, as alleged in the complaint? Answer: Yes.

"3. What was the fair and reasonable worth of said services and labor of said L. J. Brown? Answer: $1,824."

The defendant tendered the following issue: "What amount, if any, is plaintiff entitled to recover of defendant for labor and services performed within three years next prior to the death of defendant's intestate (testator)?" This was refused by the court below. Defendant excepted and assigned error.

At the close of plaintiff's testimony defendant moved that the cause of action of plaintiff, so far as it alleged any contract to make a testamentary provision for the plaintiff by the defendant's testator, A. F. Williams, be nonsuited. This was refused by the court below. Defendant excepted and assigned error.

Beasley & Stevens, Gavin & Boney for plaintiff.
A. McL. Graham and H. D. Williams for defendant.

CLARKSON, J. The questions involved:

1. Was the evidence offered by the plaintiff of an express contract to make testamentary provision for the plaintiff sufficient to be submitted to the jury? We think not.

In *Overall Co. v. Holmes,* 186 N. C., at p. 431-2, it is said: "A contract is 'an agreement, upon sufficient consideration, to do or not to do a particular thing.' 2 Blackstone Com., p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. 'A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree,' " citing numerous authorities. See *Bank v. Watson,* 187 N. C., 107; *Refining Corporation v. Sanders,* 190 N. C., 203; *Greene v. Jackson,* 190 N. C., 789; *Gravel Co. v. Casualty Co.,* 191 N. C., 313.

There is nothing to indicate, in the expressions made by defendant's testator, any certain or definite promise or contract, either express or implied, to make a testamentary provision in his will in favor of plaintiff. The expressions were not even made to plaintiff, but to others. It was an appreciation and intention, but not an obligation. *Dodson v. McAdams,* 96 N. C., 149; *Avitt v. Smith,* 120 N. C., 392.

It is well settled in this jurisdiction that where services are performed under a contract that compensation is to be provided in the will of the party receiving the benefit, and if the party breaches the contract an action lies for the anticipatory breach thereof. If the party breaches the contract by dying without a will or if testator makes no provision in the will, then an action lies for the breach of such contract at the death of the party. The plaintiff may have an action on *quantum meruit. Miller v. Lash,* 85 N. C., 51; *Laurence v. Hester,* 93 N. C., 79; *Freeman v. Brown,* 151 N. C., 111; *Helsabeck v. Doub,* 167 N. C., 205; *Shore v. Holt,* 185 N. C., 312; *Fertilizer Co. v. Eason,* 194 N. C., 244.

2. Where there is no sufficient evidence to show an express contract between the parties, and the parties are not related, can plaintiff recover on a *quantum meruit?* We think, under the facts and circumstances of this case, that it is a question to be submitted to the jury.

In *Callahan v. Wood,* 118 N. C., at p. 757, it is said: "The general rule is that when work is done for another the law implies a promise to pay for it, and it is based on the presumption arising out of the ordinary dealings among men." *Bailey v. Rutjes,* 86 N. C., at p. 520-1; *Blount v. Guthrie,* 99 N. C., 93; *Dorsett v. Dorsett,* 183 N. C., 354. See *Stokes v. Taylor,* 104 N. C., at p. 397; *Dorsey v. Corbett,* 190 N. C., at p. 788. It will be noted that plaintiff is not related to defendant's testator.

In *Dunn v. Currie,* 141 N. C., at p. 127, it is said: "These cases establish the principle that certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply, that is, a promise to pay for them, but this presumption is not conclusive, and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other. There is no fixed rule governing all cases alike, but each case as it arises must be determined upon a consideration of all the facts and circumstances, subject, however, to the legal bearing on the liability of the particular relation existing at the time between the parties."

The presumption applies to family relationship such as father and child; step-father and child; grandfather and child, etc. In *Dorsett v. Dorsett, supra,* to husband and wife.

Ruffin, J., in *Williams v. Barnes,* 14 N. C., at p. 352, says: "But this much I must say, that the jury had at least a right to pass upon the weight of the actual presumptions arising from the relation, both in estimating the wages which the plaintiff ought to be allowed, if any, and in determining whether he was to have any, except what the mother chose in her natural kindness to bestow. In other words, whether they were to live together after, as they had done before the son became of age. I think such claims, without probable evidence of contract, ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families." See *Pridgen v. Pridgen,* 190 N. C., at p. 107.

We think the evidence should be submitted to the jury on the question of *quantum meruit* for the three years prior to the death of defendant's testator. *Edwards v. Matthews, ante,* p. 39. There must be a

New trial.

CONNOR, J., not sitting.

EDWARD FULENWIDER AND MRS. EDWARD FULENWIDER v. D. A. RENDLEMAN, TRUSTEE OF THE PERPETUAL BUILDING AND LOAN ASSOCIATION OF SALISBURY, N. C.

(Filed 7 November, 1928.)

Appeal and Error—Determination and Disposition of Cause—Remand for Proper Statement of Facts Agreed.

Where a judgment of the lower court is rendered upon an insufficient or contradictory statement of facts agreed upon by the parties, the case will be remanded for a consistent statement of facts or for trial by jury.

APPEAL by defendant from *Finley, J.,* at November Term, 1927, of ROWAN.

Civil action to determine the right of plaintiffs to hold certain collateral pledged as security for the payment of two certificates of stock in the Perpetual Building and Loan Association.

By stipulation of the parties and their counsel, duly entered of record, the fact situation was agreed upon and the cause submitted to the court for determination of the question in difference upon the facts agreed. These, so far as essential to our present disposition of the case, may be abridged and stated as follows:

1. On 1 July, 1921, the plaintiff, Edward Fulenwider, purchased forty-four shares of non-taxable, paid up, 5 per cent dividend-bearing stock of the Perpetual Building and Loan Association, and had forty shares issued in his own name and four shares issued in the name of his wife.

2. The fourth and seventh paragraphs, as they appear in the agreed statement of facts, are as follows:

"Fourth. That during the year of 1924, Rev. Edward Fulenwider, for himself and his wife, Mrs. Edward Fulenwider, served notice in writing on the Perpetual Building and Loan Association to redeem certificates of stock, and gave said notice of ninety days, as required by the by-laws and the certificates, and at the expiration of the ninety days notice given to pay the sum of $3,520 the Perpetual Building and Loan Association did not redeem said stock, but requested an extension of time to redeem the stock and agreed with the plaintiff, Rev. Edward Fulenwider, that if an extension of time was given that it would secure the payment of certificates of stock, amounting to $3,520, by depositing with him as collateral security one note and mortgage of W. L. Ross and wife in the sum of $5,000, and on these conditions the plaintiffs granted an extension to redeem or pay them $3,520 for said stock by the said Building and Loan Association, and by it turning over to, and hypothecating with, him as collateral security, said note and mortgage of the said W. L. Ross, as above set forth, and this agreement was carried into effect by the said Building and Loan endorsing and turning over to the plaintiff, Rev. Fulenwider, said note and mortgage of W. L. Ross.

That on repeated occasions thereafter the said Rev. Edward Fulenwider, on behalf of himself and Mrs. Edward Fulenwider, made demand on the Perpetual Building and Loan Association to accept a surrender of said certificates of stock and to pay to him the aforesaid $3,520 as evidenced thereby, but said association did not pay said amount and deferred the payment from time to time, promising to settle in the future early as possible.

That this condition of affairs continued, although repeated demands were made; that during the month of April, 1925, the said Perpetual Building and Loan Association asked of Rev. Edward Fulenwider permission to withdraw the W. L. Ross note and mortgage he held as collateral for the payment of the aforesaid certificates of stock and to hypothecate, put up, and turn over, to him in exchange and in substitution, and upon the same conditions, as collateral security, another note and mortgage in the sum of $6,000 executed by W. A. Stoker and wife, Mrs. Sallie Mae Stoker, to said association, which note is dated 25 June, 1924, secured by mortgage registered in Book of Mortgages No. 88, page 152, to which reference is hereby made.

That at said time said association did not redeem said stock and again asked Rev. Edward Fulenwider for further extension of time to pay cash for said certificates; that at said time, April, 1925, the said Edward Fulenwider, for himself and his said wife, agreed to an exchange of the W. L. Ross note and mortgage as aforesaid for the W. A. Stoker note and mortgage, and pursuant to the aforesaid agreement the W. L. Ross collateral was withdrawn and the W. A. Stoker note and mortgage were substituted as collateral security for the payment of $3,520, as evidenced by said stock certificates, and thereupon, another extension of time was granted said association within which to pay said sum of $3,520, as evidenced by said stock certificates, and thereupon another extension of time was granted said association within which to pay said sum of $3,520 to plaintiffs.

"Seventh. That from the issuance of said certificates of stock up to 1 July, 1926, the plaintiffs retained their said stock and received five per cent dividends on said stock, which was paid by the Perpetual Building and Loan Association, and the plaintiffs are now stockholders in said association in the amount of said certificates."

3. The Perpetual Building and Loan Association was adjudged a bankrupt on 7 January, 1927, and D. A. Rendleman duly appointed trustee.

Upon these, the facts chiefly pertinent, the court held that the plaintiffs were entitled to the collateral in question and to apply the proceeds derived therefrom to the payment of their claims.

Defendant appeals, assigning error.

G. R. Uzzell and R. Lee Wright for plaintiffs.

Rendleman & Rendleman, John M. Robinson and S. E. Vest for defendant.

STACY, C. J. The trial court evidently interpreted the fourth paragraph of the agreed statement of facts to mean that the plaintiffs were creditors, and not stockholders, of the Perpetual Building and Loan Association at the time they took the collateral in question; and there is a view in which this interpretation would seem to be permissible.

4 R. C. L., 352; 9 C. J., 941. But if such be its meaning, then paragraphs four and seven of the agreed statement of facts are in conflict.

The cause, therefore, will be remanded for a consistent statement of facts or for trial by a jury. Otherwise, if the seventh paragraph of the agreed statement of facts is to control, probably the judgment should be reversed. C. S., 5180. But we do not pass upon the merits of the case in the present state of the record.

Error and remanded.

D. E. THOMAS, Jr., v. T. J. REAVIS.

(Filed 7 November, 1928.)

Appeal and Error—Determination and Disposition of Cause—Remand for Necessary Parties—Judgments.

When the parties to the litigation agree upon the facts and waive a jury trial, their agreement cannot affect others who have a legal right in the judgment to be rendered, and where the lower court has rendered judgment upon the agreed facts without the joinder of such other parties the cause will be remanded to be proceeded with according to law.

Appeal by defendant from *Shaw, J.*, at October Term, 1928, of Guilford.

Civil action for specific performance.

Plaintiff, being in duty bound to convey certain lands to the defendant, executed and tendered deed therefor and demanded payment of the price bid or offered at a sale of the property. The defendant declined to accept the deed and refused to make payment, claiming that the title offered is defective.

Upon the facts appearing of record, the court, being of opinion that the deed tendered was sufficient to convey a good title, gave judgment for the plaintiff, from which the defendant appeals, assigning errors.

Hobgood, Alderman & Vinson and Broadhurst & Robinson for plaintiff.

Hines, Kelly & Boren for defendant.

Stacy, C. J. This is not a controversy without action submitted on an agreed statement of facts for the determination of a question in difference between the parties, as authorized by C. S., 626, but it is a suit to compel specific performance of defendant's bid for a tract of land, made at a sale thereof, and to recover the amount so offered or bid. Certain facts having been agreed upon by the parties, a jury trial was waived and the matter submitted to the court for its decision, on the facts agreed, as to the validity of the title offered by the plaintiff.

While disposed to agree with the learned trial judge in his view of the law, assuming the facts to be as they now appear, yet we think it necessary that the heirs of D. E. Thomas, Sr., other than plaintiff, whose alleged interests are sought to be foreclosed, be made parties to the present proceeding and that they also agree to said facts, or that the issues be submitted to a jury, before the title offered can be said to be free and clear of any and all claims which they may have. Judgments are binding on parties and their privies as to all issuable matters contained in the pleadings, but they are not binding on strangers to the proceeding or those who have had no opportunity to be heard. *Winborn v. Gorrell,* 38 N. C., 117; *Skinner v. Moore,* 19 N. C., 138; 15 R. C. L., 1005, *et seq.*

Until the facts are agreed to by all the parties interested in the controversy, or established in a proceeding to which they are all parties, we refrain from a discussion of the facts now appearing of record.

Let the cause be remanded, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error and remanded.

W. H. HICKS v. A. J. SYKES AND BELLE A. SYKES.

(Filed 7 November, 1928.)

Arbitration and Award—Award—Pleadings.

Where the plaintiff brings action not to enforce the terms of an award, but for the alleged breach of the contract arbitrated, he may not at the trial insist upon the terms of the unpleaded award over the protest of the defendant, and there was error in the holding of the lower court that the parties were bound thereby.

APPEAL by defendants from an order of *Devin, J.,* made at Chambers in Oxford on 7 April, 1928. From ORANGE.

The plaintiff brought suit to recover damages for breach of an alleged contract for the sale of cedar trees to the defendants. The execution of the contract was admitted and the defendants alleged that the matters in controversy had been referred to arbitrators who had made an award; that the defendants had signified their acceptance of the award by affixing their signatures thereto, and that the plaintiff had refused to abide by the award; also that the defendants, upon the plaintiff's refusal, withdrew their acceptance of the award. In the order of Judge Devin there is a recital of the terms of the contract and of the agreement of the parties to leave the matter in dispute to three arbitrators who had made their award; that the plaintiff at the time declined to be bound by the award, but at the hearing stated that he was willing to be bound by its terms. It was thereupon adjudged that the restraining order theretofore issued be modified and that the defendants be allowed to cut and remove all cedar trees four inches or more in diameter at the small end of the stick, and that they be permitted to remove all cedar then cut upon the premises by entering into a bond in the sum of $200. The defendants excepted and appealed.

Thomas C. Carter for plaintiff.
Gattis & Gattis for defendants.

PER CURIAM. The alleged award of the arbitrators bears date 10 March, 1928. The summons in the action was issued 29 March, 1928. The alleged arbitration, therefore, was not made a rule of court in an action pending between the parties at the time they agreed to the arbitration. The plaintiff did not sue for a breach of the alleged arbitration and the defendants do not rely upon it as an estoppel against the plaintiff. The action is prosecuted for alleged breach of the contract; and in their answer the defendants say that because the plaintiff refused to abide by the award their acceptance of it was withdrawn. The plaintiff had no legal right, after repudiating the arbitration and bringing suit on the contract, to abandon his alleged cause of action, under the protest of the defendants, and to hold them to the award. The situation is similar to that which arose in *Carpenter v. Tucker,* 98 N. C., 316, in which it is said that as the plaintiff therein had agreed to arbitrate the matters in dispute, and had afterwards refused to comply with his agreement, the breach, under proper conditions, might be regarded as a cause of action, but not one to be set up as a defense. The controversy must be determined upon the issues which arise on the pleadings. There was error in holding that the parties are bound by the terms of the alleged award. In the latter respect the order is modified.

Modified and affirmed.

W. B. BYERLY v. GENERAL MOTORS ACCEPTANCE CORPORATION.

(Filed 7 November, 1928.)

Judgments by Default Final—When May be Rendered.

A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, express or implied. C. S., 595.

APPEAL by plaintiff from *Stack, J.,* at May Term, 1928, of GUILFORD. Affirmed.

L. B. Williams, Gold & York and Z. I. Walser for plaintiff.
Shuping & Hampton for defendant.

PER CURIAM. This was a motion made by defendant to set aside a judgment by default final. From a careful perusal of the record, we do not think the allegations of the complaint allege breaches of express or implied contracts for sums certain or computable; nor did the complaint allege a promise to pay the total amount sued for. C. S., 595.

The judgment by default final was irregular; the court below found as a fact that defendant had a meritorious defense. See *Supply Co. v. Plumbing Co.,* 195 N. C., 629. The judgment of the court below is

Affirmed.

GOODMAN v. BOARD OF COMMISSIONERS OF PERSON COUNTY.

(Filed 14 November, 1928.)

Taxation—Constitutional Requirements and Restrictions—Right of Counties to Issue Bonds Without Approval of Voters—County Finance Act.

Under the facts of this case, the validity of bonds issued for funding a valid indebtedness created prior to 7 March, 1927, for the operation of the constitutional six-months term of school, and bonds issued for funding a valid indebtedness created prior to 7 March, 1927, for erecting and equipping the county home for the indigent and infirm is upheld under the provisions of the County Finance Act.

CIVIL ACTION, heard by *Devin, J.,* at Chambers, 22 September, 1928. From PERSON.

The purpose of the action was to determine the validity of a bond issue for $65,000 for the purpose of funding valid indebtedness created before 7 March, 1927, in the necessary operation of the six months school term required by the Constitution. The action also involved the validity of a bond issue for $13,000 for the purpose of funding a valid and necessary indebtedness of the county created prior to 7 March, 1927, for the purpose of erecting and equipping the county home for the indigent and infirm of said county.

The trial judge, from the evidence offered, found the necessary and essential facts and ruled that both bond issues were valid.

From the judgment rendered the plaintiff appealed.

Luther M. Carlton for plaintiff.
Nathan Lunsford for defendant.

PER CURIAM. The bonds in question are issued in accordance with the provisions of the County Finance Act and in conformity with the provisions thereof. The findings of fact made by the trial judge and supported by evidence fully support and justify the judgment approving both bond issues. No practical purpose would be served by citation and discussion of authorities. The law is clear and well settled. *Hartsfield v. Craven County,* 194 N. C., 358, 139 S. E., 698; *Hall v. Commissioners,* 194 N. C., 768, 140 S. E., 739; *Mayo v. Commissioners, ante,* 15; *Commissioners v. Spitzer,* 173 N. C., 147, 91 S. E., 707.

Affirmed.

JOSEPH B. MARTIN v. WYTH G. MARTIN.

(Filed 14 November, 1928.)

Appeal and Error—Review—Burden of Showing Error.

The verdict of the jury, under correct instructions of the court, in favor of the defendant in an action to establish a resulting trust in lands, upon parol evidence, is upheld in the Supreme Court under the facts in this case.

CIVIL ACTION, tried before *Townsend, Special Judge,* at March Special Term, 1928, of ROCKINGHAM.

The plaintiff alleged that he and defendant entered into an agreement to purchase a certain tract of land, and that the title thereof should be taken in the name of the defendant, but that said land should be held as partnership property. Thereupon plaintiff offered evidence tending to show that he paid a part of the purchase money. The contention of the defendant was to the contrary.

The issue submitted by the court was answered in favor of defendant, and from judgment upon the verdict the plaintiff appealed.

W. R. Dalton for plaintiff.
D. F. Mayberry for defendant.

PER CURIAM. The gist of the action, as alleged by the plaintiff, was to establish an interest in a certain tract of land, the title to which had been taken in the name of the defendant.

Plaintiff testified as follows: "I got him (defendant) to take it in his name so when we traded there would be no trouble about making the title good. We held halvers in the farm down there. That was the agreement."

It is clear that plaintiff's right to recover depended upon his ability to establish a resulting trust in the land. The trial judge instructed the jury correctly upon the questions of law involved in the case. The issues of fact were found in favor of the defendant and the record discloses no error warranting a new trial.

No error.

STATE v. EVERETT McKNIGHT.

(Filed 14 November, 1928.)

Criminal Law—Motions in Arrest of Judgment—Nature and Grounds in General.

A motion to arrest a judgment in a criminal action will be allowed only where some fatal error or defect appears on the face of the record, and not where the motion is based upon a variance between the indictment and proof, or want of evidence to support the verdict.

APPEAL by defendant from *Stack, J.,* at March Term, 1928, of GUILFORD.

Criminal prosecution tried upon an indictment charging that the defendant "on 7 April, in the year of our Lord one thousand nine hundred and twenty-seven, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, feloniously and forcibly assault Harry Moore with a deadly weapon, to wit, a pistol, on or near a public highway in said county, the said Harry Moore in bodily fear and danger of his life feloniously did put and did unlawfully, wilfully, forcibly and feloniously did steal, take and carry away $40 in good and lawful money the property of the Gulf Refining Company, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Verdict: Guilty of larceny.

After conviction, and before judgment, the defendant lodged a motion in arrest of judgment for that, he alleges, the indictment is not sufficient to support a verdict of larceny. Overruled and exception. This is the defendant's only exception.

Judgment: Imprisonment in the State's prison, at hard labor, for a term of not less than two and not more than three years.

Defendant appeals, assigning error, in that the court failed to arrest the judgment on motion duly made.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

No counsel appearing for defendant.

STACY, C. J. Judgment in a criminal prosecution may be arrested, on motion duly made, when, and only when, some fatal error or defect appears on the face of the record. *S. v. Lewis,* 194 N. C., 620, 140 S. E., 434; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; *S. v. Efird,* 186 N. C., 482, 119 S. E., 881; *S. v. Jenkins,* 164 N. C., 527, 80 S. E., 231; *S. v. Douglass,* 63 N. C., 500; *S. v. Roberts,* 19 N. C., 541. But this would not include a variance between the indictment and the proof, or want of evidence to support the verdict, for they are not matters appearing on the face of the record proper. *S. v. Jarvis,* 129 N. C., 698, 40 S. E., 220; *S. v. McLain,* 104 N. C., 894, 10 S. E., 518; *McCanless v. Flinchum,* 98 N. C., 358, 4 S. E., 359.

The indictment, in the instant case, includes, or is sufficient in form to charge, the offense of larceny. C. S., 4640. Hence, the motion in arrest of judgment was properly overruled.

Affirmed.

C. A. RAGAN v. CITY OF THOMASVILLE.

(Filed 14 November, 1928.)

Limitation of Actions—Computation of Period of Limitation—Accrual of Right of Action—Trespass.

Where damages are sought for the flooding of the plaintiff's land, caused by the negligent construction and operation by a city of its sewage disposal plant, the verdict of the jury that the statute of limitations did not bar the right of action will be upheld where there is evidence that the trespass was not continuous, but was intermittent and variable, and that the first substantial damage occurred within three years next before the commencement of the action.

APPEAL by defendant from *Harwood, Special Judge,* at July Term, 1928, of DAVIDSON. No error.

Action to recover damages for injuries to plaintiff's lands and crops, caused by the negligent construction and operation of defendant's sewerage disposal system.

The issues were answered by the jury as follows:

1. Were the lands and crops of the plaintiff damaged by reason of the negligence of defendant, as alleged in the complaint? Answer: Yes.

2. If so, is the plaintiff's claim barred by the statute of limitations? Answer: No.

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $600.

From judgment on the verdict defendant appealed to the Supreme Court.

Samuel W. Ruark, McCrary & DeLapp and Phillips & Bower for plaintiff.

Roper & Roper and H. R. Kyser for defendant.

PER CURIAM. Defendant, a municipal corporation, constructed a sewerage disposal system in 1912. This action was begun on 17 October, 1927, to recover damages for injuries to plaintiff's lands and crops caused by the discharge of sewage from said system into a creek which runs through plaintiff's land. This land is located about two miles from defendant's septic tank. Plaintiff alleges that defendant's sewerage system is defective in construction and that it is negligently operated. There was evidence tending to sustain these allegations, and also to sustain plaintiff's allegations that his land and crops had been injured by defendant's negligence. Assignments of error based upon defendant's exceptions pertinent to the first and third issues cannot be sustained. These exceptions are to rulings of the court upon defendant's objections to evidence offered by plaintiffs, and to the refusal of the court to allow defendant's motion for judgment as of nonsuit.

There was conflict in the evidence with respect to when plaintiff's cause of action accrued. There was evidence tending to show that the land now owned by plaintiff was injured when defendant's sewerage disposal system was constructed in 1912, and that the injuries complained of resulted from a continuous trespass on said land, which began more than three years prior to the commencement of this action. There was evidence also tending to show that the first substantial injury to said land occurred within three years prior to the commencement of this action, and that the injuries resulted from trespasses which were irregular, intermittent and variable. The injuries to plaintiff's lands and crops were caused by the overflow of water from the creek upon plaintiff's meadow land. The quantity of sewage discharged from defendant's septic tank into the creek had been gradually and greatly increased by reason of the growth in population of the city of Thomasville within the past few years. Neither plaintiff nor defendant prayed that permanent damages be assessed for the taking or appropriation of plaintiff's land. Under instructions of the court, damages were assessed only for three years next preceding the trial.

The contentions of both parties with respect to the answer to the second issue were submitted to the jury, under instructions as to the law, which are supported by authoritative decisions of this Court. *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827; *Cardwell v. R. R.,* 171 N. C., 365, 88 S. E., 495; *Barcliff v. R. R.,* 168 N. C., 268, 84 S. E., 290; *Roberts v. Baldwin,* 151 N. C., 408, 66 S. E., 346. The jury having found from the evidence that the first substantial injury to plaintiff's land occurred within three years prior to the commencement of the action, and that the injuries complained of resulted from trespasses which were irregular, intermittent and variable, under proper instructions, answered the second issue as set out in the record. Assignments of error with respect to the trial of the second issue cannot be sustained. The judgment is affirmed. We find

No error.

MRS. MINNIE L. ELLIS, ADMINISTRATRIX OF CLARENCE ELLIS, DECEASED, v. THE DURHAM HERALD COMPANY, INC.

(Filed 14 November, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Methods of Work, Rules, and Orders—Nonsuit.**

Where, under the order of the defendant's vice-principal, its employee went upon the top of the defendant's press to repair an electrically driven machine, and there in a small space near the ceiling, it was probable that he would come in contact with a deadly, uninsulated electric rail, rendered harmless by the order of the vice-principal that the current be turned off, and while working there the vice-principal suddenly ordered the current to be turned on again, and there was circumstantial evidence that the intestate could not have heard such order, and there was evidence that there was a safer method of doing the work: *Held,* defendant's motion as of nonsuit upon the evidence was erroneously granted in the lower court.

2. **Same—Safe Place to Work.**

In the exercise of due care it is the duty of the employer to furnish his employee a reasonably safe place to do the work within the scope of his employment, and the employer is liable in damages for injury proximately caused by his negligent failure to do so, and it is not required that he should have foreseen the particular injury that followed the neglect of this duty.

3. **Trial—Taking Case or Question from Jury—Nonsuit.**

Upon defendant's motion as of nonsuit the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment therefrom, and every reasonable inference in his favor. C. S., 567.

APPEAL by plaintiff from *Bond, J.,* at March Term, 1928, of DURHAM. Reversed.

This is a civil action for actionable negligence brought by plaintiff, administratrix of her son, Clarence Ellis, against defendant. The defendant in the conduct of its business had an electric hoist machine which became out of order and needed repair. Clarence Ellis was in the employ of defendant, and at the time of his death was 19 years old. He worked with one Jack Mitchell in the pressroom of the *Durham Herald,* and was killed about 12:30 in the morning of 5 July, 1926. They got a roll of paper on the hoist and carried it around to the press to put it on the press. Something got the matter with the hoist and the wheels got off the track and it would not pull. Jack Mitchell testified, in part: "Mr. Curtis Denning said 'Go up on the press and get the hoist on the track.'" The bottom of the track was from 10 to 12 inches from the ceiling. Electricity was used in operating the hoist. Plaintiff's intestate was ordered to work in the zone near the rails which carried the electric current to operate the hoist, and fell dead when it was turned on by order of defendant's superintendent.

It was in evidence that an examination of the body disclosed that there was a brown spot across his chest. A scar across the chest, looked like a burn, and one underneath his arm. (Witness indicated mark under arm) and testified, "Seemed as if he must have had his arms up this way. It was under here."

Defendant in its answer denied any negligence, and set up the plea of contributory negligence.

At the close of the evidence defendant moved for judgment as in case of nonsuit. The motion was allowed. Plaintiff excepted, assigned error and appealed to the Supreme Court.

The other material evidence will be set forth in the opinion.

Basil M. Watkins and W. S. Lockhart for plaintiff.
Fuller, Reade & Fuller and Brawley & Gantt for defendant.

CLARKSON, J. Was defendant entitled to have its motion for judgment as in case of nonsuit allowed at the close of plaintiff's evidence? (C. S., 567.) We think not.

The question as to the admissibility of the humane and considerate articles in the local columns and editorial of the *Durham Herald,* we do not think it necessary now to decide.

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Robinson v. Ivey,* 193 N. C., at p. 810.

Under the evidence, we think that plaintiff's intestate was in duty bound to obey Curtis Denning. The evidence was to the effect "Curtis

Denning was the superintendent, or foreman, in charge of the work in the absence of Mr. Taylor." *Patton v. R. R.*, 96 N. C., 455; *Thompson v. Oil Co.*, 177 N. C., 279; *Davis v. Shipbuilding Co.*, 180 N. C., 74; *Robinson v. Ivey, supra.*

Without obedience on the part of an employee, in the conduct of business, we would have chaos. No business can be run successfully without the employee being obedient to the employer. In the present case Denning was the *alter ego.* It was his order that plaintiff's intestate obeyed.

The evidence discloses that a step-ladder was ordinarily used on previous occasions in fixing the hoist. On the occasion in controversy, under the direction of the foreman, plaintiff's intestate was ordered to "Go up on the press and get the hoist on the track." We will not narrate the evidence in detail to any extent, as the case goes back for a new trial. To operate the electric hoist, the electric current passed through the rails, which were uninsulated, live wires, and deadly when the current was on. To fix the hoist plaintiff's intestate "had to stoop. There wasn't any platform on top of the press. There wasn't any rail around there to stand on or anything. There wasn't any rail around the top of the press. There wasn't anything to stand on, only to be on the frame of the press. I guess the frame is about four or five inches wide. There isn't anything on the ceiling that could be clasped for support." When the current is off there is no danger. While attempting to fix the hoist with his foreman, Mr. Denning, the foreman instructed Jack Mitchell, who was at the switch some forty or fifty feet away, to turn on the current. "I heard him holler just about the time I cut it on. It was only a second before he hollered. After I left the switch I didn't find Ellis across the track. He fell whenever I turned the switch off—he hollered and fell. I cut the current off before he fell. I cut the current off when Denning told me. I did not let the current stay on but just a second or two. As soon as I cut it on I heard him holler to cut it off and I cut it off. I came around and saw Ellis lying under the press down between the paper."

It was in evidence that when Denning instructed Mitchell to turn on the current, plaintiff's intestate was up on the press and not as close to Denning as Mitchell. Plaintiff's intestate was on one side of the press and Denning was on the other. This could be considered on the aspect as to whether plaintiff's intestate heard the order of Denning to turn on the current. The evidence of negligence can be direct or circumstantial. We think the evidence sufficient to be submitted to the jury.

It is well settled that an employer is not a guarantor or an insurer of the safety of the place of work or of the machinery and appliances of the work. But it is the positive duty of the employer, which is primary and nondelegable, in the exercise of ordinary or reasonable care to furnish or provide his employee a reasonably safe and suitable place in which to do his work, and reasonably safe and suitable machinery and appliances. If there is a failure in this respect, and such failure is the proximate cause of any injury to an employee, the employer is liable. *Barnes v. Utility Co.,* 190 N. C., 382; *Holeman v. Shipbuilding Co.,* 192 N. C., 236; *Robinson v. Ivey,* 193 N. C., 805; *Smith v. Ritch, ante,* 72; *Maulden v. Chair Co., ibid.,* 122; *Street v. Coal Co., ibid.,* 178.

In *Pigford v. R. R.,* 160 N. C., at p. 100, it is said: "It is well understood, however, that an employer of labor may be held responsible for directions given or methods established of the kind indicated, by reason of which an employee is injured." *Ogle v. R. R.,* 195 N. C., 795.

In *Jefferson v. Raleigh,* 194 N. C., at p. 482, it is said: "It is not essential that the particular injury could have been foreseen, but that some injury was likely to flow from the method used in performing the work. This principle of liability first announced in *Drum v. Miller,* 135 N. C., 204, flows through the decisions without a break, but with increasing volume. *Hall v. Rhinehart,* 192 N. C., 706." For the reasons given, the judgment below is

Reversed.

BURLINGTON HOTEL CORPORATION v. DIXON.

(Filed 14 November, 1928.)

1. Evidence—Evidence at Former Trial—Admissions of Record in Former Trial.

A solemn admission put in record by the attorneys of a party are admissible in evidence against him in a subsequent action brought by him against a third party when the second action involves the same question.

CIVIL ACTION, heard by *Small, J.,* at Second May Term, 1928, of ALAMANCE.

Plaintiff instituted an action against the defendant in the court of a justice of the peace to recover the sum of $100 upon a stock subscription note for one share of stock in plaintiff corporation. The defendant admitted the execution of the note, but alleged that the note was secured by the plaintiff in a stock-selling scheme in violation of the Blue Sky law in that the plaintiff procured the Hockenbury System to sell said stock wrongfully. The plaintiff offered evidence tending to show that the stock of plaintiff was sold by citizens to various people in Burlington, including the plaintiff, in pursuance of a patriotic and local pride undertaking to secure a hotel, and that these citizens who sold said stock received no compensation for their services whatever, and that the Hockenbury System solicited no stock subscriptions and sold no stock, but were employed for the purpose of advertising the project and of instructing, counseling and supervising teams of citizens who actually sold the stock. Mr. C. C. Haworth sold the stock in controversy to plaintiff. There was no evidence that Mr. Haworth received any compensation from any source whatever for the sale of said stock. The trial judge peremptorily instructed the jury to answer the issue of indebtedness in favor of the plaintiff.

From judgment upon the verdict the defendant appealed.

Coulter, Cooper & Carr for plaintiff.
J. Dolph Long for defendant.

BROGDEN, J. Is a pleading or solemn admission put in the record by the pleader's attorneys admissible in evidence against the pleader in a suit by the pleader against a third party involving the same question?

The defendant offered in evidence excerpts from the agreed statement of facts signed by counsel for plaintiff and constituting a part of the record in the case of *Burlington Hotel Corporation v. Bell.* This agreed statement of facts admitted that the Hockenbury System was employed to sell stock and receive a commission upon such sales. The plaintiff objected to the admission of this evidence, and the objection was sustained. In *Hotel Corporation v. Bell,* 192 N. C., 620, 135 S. E., 616, the Court expressed doubt as to whether the contract between the Burlington Hotel Corporation and the Hockenbury System constituted an agency for selling stock as contemplated by law, but the decision was based upon the admission in the agreed statement of facts contained in the record in that case.

The courts generally hold that a pleading containing an admission is competent against the pleader, in a subsequent case, on behalf of a stranger. The rulings of courts of last resort upon the subject are assembled in 14 A. L. R., p. 56. In this State the question was first considered in *Kiddie v. DeBrutz,* 2 N. C., 420. This decision was rendered in October, 1796, and held that an admission in an answer could be offered in evidence against the defendant in an action by a third person. To the same effect is the ruling in *Bloxham v. Timber Corporation,* 172 N. C., 37, 89 S. E., 1013, where it was held: "It is not necessary to the competency of a pleading, as an admission against the party, that it be one filed in an action between the same parties. A pleading filed in any action is competent against the party if he signed it or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts." In the case at bar the defendant offered an agreed statement of facts signed by counsel for both parties in the former suit. The rule with respect to admissions contained in pleadings apply to solemn admissions signed by counsel and set out in the record. Thus, in *Guy v. Manuel,* 89 N. C., 84, the Court said: "For the admissions of attorneys in the conduct of an action are always admissible in evidence against their clients, especially when the admissions are of record. 'The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial, though previously to such trial the party give notice that he intends to withdraw them; or, though the pleadings be altered, provided the alterations do not relate to the admissions. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial.' "

However, while it is competent to introduce pleadings or solemn admissions as defined by law as evidence, nevertheless the admissions so admitted are not conclusive. The party making such admissions has the legal right to show, if he can, that they were made under misapprehension or by inadvertence or mistake, or for the purpose of dispensing with formal proof, or that they were made for the purpose of presenting a particular point in the particular case under consideration. *Mason v. McCormick,* 85 N. C., 226; *Adams v. Utley,* 87 N. C., 356; *Smith v. Nimocks,* 94 N. C., 243; *Norcum v. Savage,* 140 N. C., 472, 53 S. E., 289; *Alsworth v. Cedar Works,* 172 N. C., 17, 89 S. E., 1008; *Ledford v. Power Co.,* 194 N. C., 98, 138 S. E., 424.

The plaintiff relies upon the case of *Eigenbrun v. Smith,* 98 N. C., 207, 4 S. E., 122. This case is not in point. Apparently the pleading was offered to contradict the statement of a witness who was not a party to the action.

The exclusion of the evidence so offered by the defendant was error warranting a

New trial.

JOHN H. WEIR v. JOHN T. WEIR.

(Filed 14 November, 1928.)

1. **Execution—Sale—Manner, Conduct, and Validity of Sale.**

   The sheriff at the sale under execution of a judgment must conduct the sale in a prudent and just manner so as to realize a fair price for the property thus sold, or the sale will be voidable upon motion in the cause made by a party whose rights are thereby affected.

2. **Same.**

   The mere fact that the property sold at an execution sale was *en masse*, or that the price it brought was inadequate, will not suffice in equity to set the sale aside in the absence of allegations and proof of elements of fraud, unfairness, oppression, or undue advantage on the part of the sheriff or purchaser at the sale.

3. **Same—Equity.**

   Where property is sold under execution of a judgment, gross inadequacy of price may be considered in equity with other evidence of fraud or unfairness in the sale, though standing alone it is insufficient for the interference of the courts.

4. **Same—Title and Rights of Purchaser—Upset Bids.**

   An execution sale, when closed, is not subject to an upset bid, C. S., 2591, 3243 not being applicable thereto. C. S., 671.

APPEAL by W. H. Collins from *Townsend, Special Judge,* at May Term, 1928, of UNION.

Motion by Mrs. M. J. M. Weir and W. H. Wood, executors under the will of John H. Weir, deceased, to set aside and declare void a sale of lands, made under execution, issued in the present cause, to satisfy the judgment of $3,700, and interest, rendered during the lifetime of John H. Weir.

Movants ask that the sale be set aside and a resale ordered upon four grounds:

1. For that the deputy sheriff, B. Frank Niven, who conducted the sale, offered the property *en masse,* and declined to sell only a part of it that day, as requested by R. Lee Weir, son of Mrs. M. J. M. Weir, who attended the sale for the purpose of bidding on the property and protecting the interests of his mother.

2. Because, from a conversation had with B. Frank Niven, deputy sheriff, just prior to the sale, the said R. Lee Weir was put under the impression that the bid, made on that date, could be upset at any time within twenty days by filing an increased bid of ten per cent, which was offered within said time, and is still subsisting.

3. That the bid of "three hundred ten dollars and taxes," made by W. H. Collins, who became the last and highest bidder at said sale, was

ambiguous and uncertain, in that, the property was sold subject to three mortgages, according to announcement, while the amount of taxes, and the number of years due, was not stated, and this "disconcerted and surprised" the said R. Lee Weir, by reason of which he was "misled and deceived, without fault on his part, when he could and would have bid a substantially larger sum than the amount of W. H. Collins' bid, if said bid had been explicit in amount and unambiguous in its terms."

4. That the bid of W. H. Collins is entirely inadequate for the property sold; and, if allowed to stand, movants will realize only a small sum to be applied on the judgment rendered herein, whereas a much larger amount could and would be obtained on a resale. But the extent of the alleged inadequacy is not stated.

The clerk found the facts substantially as alleged by the movants, and upon such finding, vacated and set aside the sale as requested. This order was approved by the judge of the Superior Court, and the purchaser, W. H. Collins, appeals, assigning errors.

H. B. Adams for movants.
John C. Sikes for W. H. Collins, appellant.

STACY, C. J., after stating the case: That the movants have properly proceeded by motion in the cause is established by the decisions in *Williams v. Dunn,* 163 N. C., 206, 79 S. E., 512, *Beckwith v. Mining Co.,* 87 N. C., 155, and *Foard v. Alexander,* 64 N. C., 69. And that they are entitled to make such motion is supported by the decisions in *Andrews v. Pritchett,* 72 N. C., 135, and *McCanless v. Flinchum,* 98 N. C., 358, 4 S. E., 359.

"It is clearly the duty of a sheriff to conduct his sales in a prudent and just manner, so as to realize a fair price for the property sold. And if he does otherwise, the sale is voidable. Voidable by whom? The general answer is, voidable by any person injured thereby; by the defendant in the execution; by the plaintiff in the execution; by any creditor of the execution debtor." *Andrews v. Pritchett, supra.*

But it has been held with us in a number of cases that an execution sale, when closed, is not subject to an upset bid—sections 688 (superseded by chapter 255, Public Laws 1927), 2591 and 3243 of the Consolidated Statutes not being applicable to execution sales—and, when regularly made, such sale is not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which must be alleged and proved, with each case to be judged by its own facts. C. S., 671, *et seq., Burton v. Spiers,* 92 N. C., 503; *Bank v. Graham,* 82 N. C., 489; *Beckwith v. Mining Co.,* 87 N. C., 155; *Black v. Justice,* 86 N. C., 504; *Crews v. Bank,* 77 N. C., 110; *Woodley v. Gilliam,* 67 N. C., 237;

Hill v. Whitfield, 48 N. C., 120; *Bailey v. Morgan,* 44 N. C., 352; *Smith v. Greenlee,* 13 N. C., 126; *Oxley v. Mizle,* 7 N. C., 250; *Brodie v. Seagraves,* 1 N. C., 96.

A sale *en masse* is not void, but will be supported where no fraud or unfairness is shown either on the part of the sheriff or the purchaser. *Williams v. Dunn, supra; McCanless v. Flinchum, supra; Jones v. Lewis,* 30 N. C., 70; *Huggins v. Ketchum,* 20 N. C., 550.

Nor is inadequacy of price alone sufficient to avoid the sale. *Davis v. Keen,* 142 N. C., 496, 55 S. E., 359; *Trust Co. v. Forbes,* 120 N. C., 355, 27 S. E., 43. But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Worthy v. Caddell,* 76 N. C., 82; 17 A. & E. (2 ed.), 1003; note: 42 L. R. A. (N. S.), 1198.

A careful examination of the record leaves us with the impression that no sufficient facts have been presently established from which it may be reasonably inferred that the sale should be set aside. However, the movants may yet show, if they can, such facts and circumstances as will entitle them to the relief sought.

Error.

MRS. M. J. M. WEIR, INDIVIDUALLY, AND MRS. M. J. M. WEIR AND W. H. HOOD, EXECUTORS OF THE WILL OF JOHN H. WEIR, DECEASED, v. CLIFFORD FOWLER, SHERIFF OF UNION COUNTY, AND W. H. COLLINS.

(Filed 14 November, 1928.)

Injunctions—Preliminary and Interlocutory Injunctions—Grounds Therefor.

In an action to declare a sale of land under execution of judgment void, the remedy of restraining further proceedings under the sale is by motion in the original cause, and a separate action for a restraining order is unnecessary.

APPEAL by defendants from *Deal, J.,* at Chambers in Wadesboro, 7 March, 1928. From UNION.

Civil action to enjoin the sheriff of Union County from delivering deed for certain lands to W. H. Collins, the last and highest bidder at an execution sale.

Upon the return of the temporary order, the same was continued to the hearing. Defendants appeal, assigning errors.

H. B. Adams for plaintiffs.
John C. Sikes for defendants.

STACY, C. J. This is a companion case to *Weir v. Weir, ante,* 268. Plaintiffs instituted the present action to restrain the sheriff from delivering deed for the lands sold under execution, until a hearing could be had on their motion, made in the original cause, to have said sale set aside and the same declared void. This was unnecessary, as the same relief, if needed, could have been obtained by motion in the original cause. Indeed, the granting of an order *nisi* to set aside an irregular execution, in such proceeding, operates, as soon as the parties have notice of it, to stay any further action. *Foard v. Alexander,* 64 N. C., 69; *Long v. Jarrett,* 94 N. C., 443.

Error.

IN RE WILL OF E. C. THOMPSON.

(Filed 21 November, 1928.)

Wills—Requisites and Validity—Codicils.

A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as the statute requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. C. S., 4144.

APPEAL by the executors from *Small, J.,* at Chambers, 22 June, 1928. From ORANGE.

The following judgment was rendered in the court below:

"This cause coming on regularly to be heard before his Honor, the undersigned, on appeal from the clerk of the Superior Court of Orange County on the question of probating a paper-writing purporting to be a codicil to the will of E. C. Thompson, and the propounder of said instrument having offered for probate a note of R. T. Howerton and wife in the possession of the executors of E. C. Thompson, deceased, for five hundred dollars ($500), dated 9 January, 1924, duly assigned to E. C. Thompson.

"That E. C. Thompson, late of Orange County, died on 22 March, 1925, leaving a last will and testament with two codicils thereto dated 30 April, 1921, 4 March, 1922, and 15 August, 1923, respectively, all having been written entirely in the handwriting of the testator, and the will and codicils thereto being each duly acknowledged before two subscribing witnesses, which will and codicils were duly probated on 28 March, 1925, and is recorded in the office of the clerk of the Superior Court of Orange County in Book of Wills J., page 330; that there was no residue clause to the will or codicils.

"That there was found among the valuable papers of the late E. C. Thompson, in his lock chest box, not only the will above referred to, but also many deeds, mortgages, notes, etc., among which was one note of R. T. Howerton and wife in the amount of five hundred dollars ($500) dated 9 January, 1924, which note was not in any way attached to the will above referred to, but was in the same lock box or chest; that said note had been duly assigned to the late E. C. Thompson, and on the back thereof bore the following notation: 'I asigen thee with note over to my wife Mrs. C. E. Thompson at my deth this the 11 day of November 1924. E. C. Thompson.'

"And it appearing from the evidence of George F. Crutchfield, W. E. Thompson and Margaret Crutchfield that the said notation on the back of said note was made entirely in the handwriting of E. C. Thompson, each of the witnesses testifying that he or she was acquainted with the handwriting of said E. C. Thompson, having often seen him write, and each having testified that the name of E. C. Thompson subscribed to the end of said notation on the back of said note, and every part of said notation, was the signature and handwriting of E. C. Thompson, and further that said note was found after the death of E. C. Thompson, filed away with the valuable papers and effects of E. C. Thompson in a locked chest which contained deeds, notes and other valuable papers of E. C. Thompson.

"The court further finds that the propounder of the instrument now in question did on 30 May, 1927, offer said instrument for probate as a codicil to the last will and testament of the late E. C. Thompson, but that the clerk of the Superior Court of Orange County did refuse to admit same to probate by judgment bearing date of 30 May, 1927, and the propounder duly appealed to the Superior Court.

"Now therefore, it is hereby found as a fact by the court that the notation 'I asigen thee with note over to my wife Mrs. C. E. Thompson, at my deth, this 11 day of November, 1924, E. C. Thompson,' is entirely in the handwriting of the deceased E. C. Thompson; that the name of E. C. Thompson subscribed at the end of said writing is the signature of E. C. Thompson; and it is further found as a fact that the paper was found after the death of E. C. Thompson among his valuable papers, it having been found in his locked box which contained deeds, notes and other valuable papers. The court further finds that it was the intention of said E. C. Thompson that the notation on the back of said note should operate as a codicil to his will and that his wife, Mrs. C. E. Thompson, should own said instrument. And the objectors to the probate of said instrument, being all the necessary parties, having waived all formalities as to notice to necessary parties, and no objection having been raised to the probate of said instrument on the grounds of undue influence or mental incapacity of the said E. C. Thompson, and it further appearing that no final account has been filed or settlement made in this estate;

"Now, therefore, it is hereby found that said instrument now in question is in fact a codicil to the will of the late E. C. Thompson and should be admitted to probate as such codicil in the office of the clerk of the Superior Court of Orange County, and said clerk therefore is hereby ordered and directed to admit said instrument to probate as a codicil to the will of the late E. C. Thompson.

"It is further ordered that the executors pay the court costs of this proceeding."

The executors of the estate of E. C. Thompson excepted to the judgment, assigned error and appealed to the Supreme Court.

Gattis & Gattis and A. H. Graham for executors (caveators).
Victor S. Bryant for propounders.

CLARKSON, J. The sole question presented: Is the paper-writing offered for probate a codicil to the last will and testament of E. C. Thompson, deceased? We think so.

C. S., 4144 sets forth the statutory manner and method of making valid wills: (1) attested, (2) holographic, (3) nuncupative.

From the judgment, it will be noted that the requirements of the statute have been complied with and the instrument has been probated as a holographic will.

The language of the instrument in question is: *"I asigen thee with note over to my wife Mrs. C. E. Thompson at my deth this the 11 day of November, 1924."* It will be seen that the instrument was in the handwriting of E. C. Thompson, inartificially drawn, but the language is explicit. When it appears on the face of the instrument that the *"animo testandi"* is ambiguous or obscure, the question is ordinarily submitted to the jury for determination. *In re Harrison,* 183 N. C., 459; *In re Southerland,* 188 N. C., 325; *In re Westfeldt,* 188 N. C., 702.

The principle, to constitute a valid testamentary disposition, is laid down in 28 R. C. L., p. 60-1 (Wills), as follows: "One distinguishing feature of a will is that it is not to take effect except upon the death of the testator, and has no binding effect during the life of the testator. Until the death of the maker it is ambulatory and revocable. It is of the essence of a will that it should be revocable. An irrevocable will would be an anomaly. A will does not confer any present right at the time of its execution, and nothing vests by reason of such an instrument during the life of the devisor. A will may be compared to an undelivered deed or power of attorney, which contains an expression of a purpose which has not yet gone into effect, but on the death of the maker it ceases to be ambulatory, acquires a fixed status, and operates as a transfer of title."

The language of the instrument in the present case, we think, sufficient and comes up to the requirements, and the instrument on its face constitutes a testamentary disposition of the note.

A letter written by the deceased a few days prior to his death, giving a list of his property and effects and of his indebtedness, and made in favor of his wife, requesting the addressee to so invest his property that she will "get it as she needs it," so that she will have a plenty as long as she lives, etc., is valid as a holograph will appointing the addressee as executor, etc., when meeting the requirements of the law, it being in testator's handwriting, his signature appearing therein, and found in the writer's safe among his valuable papers, etc., there being no particular form of a will necessary, and the writing in question evincing an *animo testandi*. *In re Will of Ledford,* 176 N. C., 610, citing and distinguishing *Spencer v. Spencer,* 163 N. C., 88, as follows: "The case of *Spencer v. Spencer,* 163 N. C., 88, is no authority for the position that a paper in form of a letter cannot be a will; it simply holds that the paper then offered for probate had none of the earmarks of a will."

In Anno. to *Re Kelleher,* 54 A. L. R., at p. 921, the following comment is made: "In *Alston v. Davis* (1896), 118 N. C., 202, 24 S. E., 15, although the principal object of the letter appeared to be to give directions for the renting of the testator's land, the statement therein, 'If I should die, or get killed in Texas, the place must belong to you; and I would not want you to sell it,' was held testamentary in character, *Furches, J.,* dissenting. However, in *Spencer v. Spencer* (1913), 163 N. C., 83, 79 S. E., 291, the Court said: 'The case of *Alston v. Davis, supra,* is relied upon by plaintiffs; we admit that it sustains plaintiff's position, but we are unwilling to follow it as a precedent. It is weakened as such by a brief but expressive and forceful dissent, and by the further fact that another member of the court took no part in the decision."

The present case is not controlled by either one of these decisions.

A notation on the back of an envelope, "Julia W. Johnston Will," referring to an instrument in the envelope, was held to be a valid holographic will. *Alexander v. Johnston,* 171 N. C., 468. See case cited in that opinion.

In *Hunt v. Hunt,* 4 N. H., 434, 17 Am. Dec., 438, the decedent indorsed on the back of a note these words: "If I am not living at the time this note is paid, I order the contents to be paid to A. H." He died before the note was paid. This was held to be a testamentary disposition. In *Fickle v. Snepp,* 97 Ind., 289, 49 Am. Rep., 449, the instrument was in form a promissory note. In all these cases the papers were probated as a will. Indeed, the general rule is that an instrument is a will, if properly executed, whatever its form may be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. *Babb v. Harrison,* 9 Rich. Eq., 111, 70 Am. Dec., 203. *Morrison v. Bartlett,* 41 L. R. A., p. 43 (N. S.).

In re Perry, 193 N. C., p. 397. There was presented for probate a note for $1,500, executed under seal by J. R. Williams and W. H. Allen to K. W. Perry, 18 March, 1915, due and payable one year after date, the note had pinned to it a small slip of paper, with the following notation, in the handwriting of the deceased, written in pencil: "I want Siddie Williams have this pack. K. W. Perry." This was held not a will, as not coming within the requirements. This Court in that case said: "It will be observed that the language used is simply 'I want Siddie Williams have this pack,' and there is nothing to indicate when he wanted her to have it. He does not say he wants her to have it at his death or in case of his death. A will is a disposition of property to take effect on or after the death of the owner. *In re Edwards' Will, supra* (172 N. C., 369); *Payne v. Sale,* 22 N. C., 457."

Mere intention is not sufficient. *In re Johnson,* 181 N. C., 303.

Codicils need not be physically attached to the original will or to each other. *In re Westfeldt,* 188 N. C., p. 702.

For the reasons stated, we see no reason why the instrument is not a valid codicil. The judgment below is

Affirmed.

CARLIE LOWE, ADMINISTRATRIX OF JAMES J. LOWE, v. J. F. TAYLOR.

(Filed 21 November, 1928.)

Master and Servant—Liability of Master for Injuries to Servant—Tools, Machinery, and Appliances—Negligence—Proximate Cause.

Where the plaintiff's intestate was engaged to deliver gasoline to defendant's customers by auto truck, and there was evidence tending to show that he was killed by the truck turning over on the highway because of defective brakes thereon, defendant's motion as of nonsuit thereon will be denied, the question of the causal connection between the negligence and the injury being ordinarily for the jury.

APPEAL by defendant from *Deal, J.,* at April Special Term, 1928, of DURHAM. No error.

Action to recover damages for wrongful death of plaintiff's intestate.

The issues submitted to the jury were answered as follows:

1. Was the death of plaintiff's intestate caused by the negligence of defendant, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate contribute to his own injury and death as alleged in the answer? Answer: No.

3. Did plaintiff's intestate, James Lowe, assume the dangers incident to the driving of the Reo truck on the date of his death, as alleged in the answer? Answer: No.

4. What sum is plaintiff entitled to recover of defendant, J. F. Taylor, as damages? Answer: $5,000.

From judgment on the verdict defendant appealed to the Supreme Court.

R. O. Everett and John W. Hester for plaintiff.
Fuller, Reade & Fuller and Brawley & Gantt for defendant.

CONNOR, J. Defendant is engaged in the business of selling gasoline and oils. His place of business is at East Durham, N. C. Some of his customers live in Durham County, at a distance from his place of business. Defendant delivers gasoline and oils to these customers by means of trucks.

Plaintiff's intestate, James J. Lowe, was employed by defendant as a driver of one of his trucks. He had been so employed for about eight months preceding his death on 4 March, 1926. During this time he had driven a Reo truck, furnished him by defendant. He was a careful and experienced driver, about 32 years of age.

Early during the afternoon of 4 March, 1926, plaintiff's intestate left defendant's place of business at East Durham, driving the truck furnished him by defendant. The tank on this truck contained gasoline, which was to be delivered by him to defendant's customers on his regular route. Late in the afternoon of the same day, after he had called on these customers, he was returning to East Durham. As he was driving the truck on the road from Bahama to Durham it ran off the road, turned over, and threw him out of his seat in the truck to the ground. As the result of injuries which he thereby sustained, plaintiff's intestate was rendered unconscious. He died soon after his body was discovered, lying on the edge of the road.

At the time the truck left the road and turned over, throwing the deceased out upon the ground, it was going down grade, after having turned a sharp curve in the road. There was evidence tending to show that the truck first left the surface of the road and ran a short distance on the shoulder; it was then driven back on the road, when it turned over. After the accident, it was found that the emergency brake had been pulled up tight. It was locked. The truck was lying off the road at a distance of about eight or nine feet. The service brakes were defective; they would not hold.

There was evidence tending to sustain the allegation in the complaint that defendant had failed to exercise due care to provide reasonably safe brakes on the truck. The brakes were defective and in a dangerous condition when plaintiff's intestate drove the truck out of defendant's place of business early in the afternoon. Defendant had been informed of the condition of the brakes, and had promised plaintiff's intestate that he would have them repaired, when he returned from his trip.

On his appeal to this Court, defendant concedes that there may be evidence of negligence on his part, with respect to the brakes; he contends, however, very earnestly that there was no evidence from which the jury could find that this negligence was the proximate cause of the injuries to plaintiff's intestate, resulting in his death. He insists, therefore, that there was error in the refusal of the trial court to allow his motion for judgment as of nonsuit, at the close of all the evidence. C. S., 567. His only assignment of error is based upon his exception to the refusal to allow this motion.

It is elementary, of course, that there can be no recovery by the plaintiff in an action for damages, alleged to have been caused by the negligence of the defendant, unless the negligence alleged in the complaint and established by the evidence is the proximate cause of the injuries for which damages are demanded. The plaintiff must offer evidence from which the jury can find not only that defendant was negligent, as alleged in the complaint, but also that this negligence was the proximate cause of the injury complained of. If the evidence is not sufficient to sustain the finding by the jury of both these essential elements of actionable negligence, defendant's motion for judgment dismissing the action as of nonsuit must be allowed.

However, where there is evidence sufficient to sustain both the allegations of negligence, and of injury, whether or not there is the essential causal relation between the alleged negligence and the injury, is ordinarily a question for the jury. *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466. In *Taylor v. Stewart,* 172 N. C., 204, 90 S. E., 134, *Brown, J.,* after holding that the violation of a statute by the defendant as shown by the evidence in that case, was negligence *per se,* says: "It does not follow, however, that the defendant is liable in damages, for the plaintiff must go further and satisfy the jury by a preponderance of the evidence of the fact that such negligence was the proximate cause of the death of the child." He quotes with approval from the opinion of *Strong, J.,* in *R. R. v. Kellogg,* 94 U. S., 469, 24 L. Ed., 256, where it is said: "What is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it." See, also, *Taylor v. Lumber Co.*, 173 N. C., 112, 91 S. E., 719.

There was evidence upon the trial of the instant case from which the jury could find that the defective brakes caused the truck to turn over and throw plaintiff's intestate from his seat in the truck to the ground. There was no evidence tending to show any other cause of his fatal injuries. Other causes are suggested in the brief filed in this Court in behalf of defendant, but there was no evidence from which the jury could have found that they or either of them was the proximate cause of the fatal injuries. It could not have been held as a matter of law that there was no evidence of a causal relation between the negligence of defendant and the injuries and death of plaintiff's intestate.

There was no error in the refusal of the motion for judgment as of nonsuit. The evidence was properly submitted to the jury, who under instructions to which there was no exception returned the verdict upon which the judgment was rendered. The judgment is affirmed.

No error.

IN THE MATTER OF W. R. BAUGUESS, TRUSTEE, AND THE BANK OF DAMASCUS.

(Filed 21 November, 1928.)

Mortgages—Foreclosure—Disposition of Proceeds—Clerks of Court—Actions.

The only authority conferred by C. S., 2591, on the clerk of the Superior Court is to order a resale of property foreclosed under mortgage or deed of trust upon lands where the bid has been raised in ten days under certain terms and conditions therein prescribed, and where there are a first and second mortgage upon such lands, foreclosed under the second, an exception to the distribution of the proceeds is untenable, the remedy, if any, being by independent action.

APPEAL by Alice Greer from *Clement, J.*, at July Term, 1928, of ASHE. Error.

It appears from the record that W. T. Greer and wife, Alice Greer (appellant), made two liens: (1) To the Atlantic Joint Stock Land Bank; (2) a deed of trust to W. R. Bauguess, trustee for the Bank of Damascus, dated 26 May, 1924, duly recorded in the register of deeds' office for Ashe County, in Book No. 25, p. 156. The amounts are not set forth in the record nor the quantity of land or exact terms and conditions on which the land was sold. It is set forth that the trustee, pursuant to C. S., 2591, on account of default in the payment of the notes due the Bank of Damascus, sold the land and in the trustee's report to the clerk of the Superior Court it is stated: "At said sale the Bank of Damascus became the last and highest bidder for the sum of $7,000 (total). Subject to prior mortgage to Atlantic Joint Stock Land Bank to be paid out of this bid. This 10 September, 1927."

The order of the clerk is as follows: "It appearing that under the foregoing order a sale of the above-described property was made on 10 September, 1927, and was purchased by the Bank of Damascus at the sum of $7,000, subject to prior mortgage to be paid out of purchase price at Atlantic Joint Stock Land Bank: It is, therefore, ordered, considered and adjudged that the trustee make the purchaser a good and sufficient deed upon the payment of the purchase money. This 20 September, 1927."

Alice Greer gave the following notice: "To J. D. Stansberry, clerk Superior Court, and W. R. Bauguess, trustee: You, and each of you, are hereby notified that Alice Greer excepts and appeals from the order made by the clerk of the Superior Court of Ashe County on 20 September, 1927, and recorded in Book of Re-Sales of Land by Trustees and Mortgagees No. 1, page 61, in so far as said order provides for the distribution of the funds arising from the sale of the property sold under and by virtue of a deed of trust to the Bank of Damascus, the said Alice Greer not objecting to the confirmation of the sale, but objects to the order as to the distribution of the proceeds of said sale, alleging the same to be, as she is advised and believes, illegal and improper application of the proceeds of said sale, and the said Alice Greer requesting that the proceedings in the above-entitled cause be certified to the Superior Court to the end that it may be reviewed as required by law. This 24 September, 1927."

The court below rendered the following judgment: "In the Superior Court, July Term, 1928. This cause coming on to be heard before his Honor, J. H. Clement, judge presiding, upon exceptions filed to the decree of confirmation of the clerk of the Superior Court, confirming the sale in this cause, and being heard, it is considered and adjudged that said exceptions are overruled and the sale is hereby confirmed; and from this judgment Alice Greer, the party filing the exceptions, appeals to the Supreme Court."

The assignment of error is as follows: "That his Honor erred in overruling the exceptions of Alice Greer to the decree of confirmation of the clerk and signing a judgment confirming the decree of confirmation of the clerk."

T. C. Bowie for appellant, Alice Greer.
W. R. Bauguess for appellee, W. R. Bauguess, trustee.

CLARKSON, J. C. S., 2591, in regard to reopening sales on advance bids, when real estate is sold under mortgages or deeds of trust, etc., is interpreted in *In re Ware,* 187 N. C., 693, and cases cited. See, also, *Trust Co. v. Powell,* 189 N. C., 372; *Newby v. Gallop,* 193 N. C., 244; *Cherry v. Gilliam,* 195 N. C., 233.

In *Cherry v. Gilliam, supra,* at p. 234, it was said that C. S., 2591, "confers no power on the clerk to make any orders unless the bid is increased."

The plaintiff's remedy was by an action. The motion is dismissed.

Error.

STATE v. C. M. GRACE.

(Filed 21 November, 1928.)

1. **Embezzlement—Indictment—Proof and Variance.**

   The crime of embezzlement rests upon statute alone, and conviction thereof under an indictment drawn under C. S., 4268, when the evidence tends only to show a violation of C. S., 4270, is erroneous upon the ground that the proof is at variance with the offense charged in the bill.

2. **Indictment—Proof and Variance—Methods of Raising Question—Motions.**

   The method of raising the question of variance between the indictment and proof is by motion to dismiss as in case of nonsuit, and not by motion in arrest of judgment.

3. **Criminal Law—Motions in Arrest of Judgment—Nature and Grounds in General.**

   A motion to arrest a judgment in a criminal action will be allowed only where some fatal error or defect appears on the face of the record.

APPEAL by defendant from *Oglesby, J.,* at May Term, 1928, of MECKLENBURG. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Jake F. Newell, A. A. Tarlton and W. H. Bobbitt for defendant.

ADAMS, J. The defendant was convicted of embezzlement. The indictment, which was drafted conformably to C. S., 4268, charges that the defendant was the agent, consignee, clerk, employee, and servant of a charitable organization known as The House of Prayer; that he was entrusted with the receipt of money for the organization; and that he received and had under his care the sum of five thousand dollars, which he embezzled and fraudulently converted to his own use. The evidence includes a number of transactions, but the circumstances on which the State chiefly relies, granting for the immediate purpose that they are sustained by the testimony, are these: (1) the fact that the original deed to the Charlotte property was taken in the defendant's name; (2) that the defendant's use of $385 for the purchase of a tent in Norfolk was unauthorized; (3) that the defendant's use of $1,200 for the purchase of a lot in Washington for The House of Prayer was not authorized.

The defendant contends that the proof in respect to these matters is not comprehended by or included in the indictment; that if the defendant is guilty of any offense it is a breach of that portion of C. S., 4270, not embraced in the bill of indictment, and that there is a fatal variance between the allegation and the proof. The Assistant Attorney-General, pursuant to his uniform frankness, admits that the proof does not sustain the specific charge on which the defendant is prosecuted, and that the alleged variance is fatal.

The crime of embezzlement is of statutory origin, and the principle is established that when the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the offense described. *S. v. Maslin,* 195 N. C., 537; *S. v. Edwards,* 190 N. C., 322; *S. v. McDonald,* 133 N. C., 680; *S. v. Bagwell,* 107 N. C., 859. The indictment does not follow the descriptive words in C. S., 4270.

The defendant moved in arrest of judgment, but the motion was properly denied for the reason that a criminal prosecution may be arrested only for some error or defect appearing on the face of the record. *S. v. McKnight, ante,* 259; *S. v. Lewis,* 194 N. C., 620. But the defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in *S. v. Gibson,* 170 N. C., 697; *S. v. Harbert,* 185 N. C., 760; *S. v. Harris,* 195 N. C., 306. At the close of the State's evidence and at the conclusion of all the evidence the defendant moved to dismiss the action. The motion should have been allowed. The judgment and verdict will be set aside and the action dismissed with leave to the Solicitor to send another bill, if he deems it advisable to do so.

Reversed.

J. L. DELANEY AND F. R. MCNINCH, COMMISSIONERS, v. DAVID CLARK.

(Filed 21 November, 1928.)

1. **Judges—Rights, Powers, and Duties—Order of Sale of Real Property for Reinvestment.**

   The court has the power to order the private sale of lands affected with contingent interests under the provisions of C. S., 1744, under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto.

2. **Same—Proceeds of Sale.**

   Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree.

APPEAL by defendant from *Townsend, Special Judge,* at October Term, 1928, of MECKLENBURG.

Civil action for specific performance.

Plaintiffs, commissioners appointed in a special proceeding pending in the Superior Court of Mecklenburg County, to make sale of certain lands for reinvestment, etc., as provided by C. S., 1744, offered same to the defendant, who agreed to purchase said lands, consisting of 63.65 acres, at and for the price of $750 per acre and to pay 20 per cent of the purchase price in cash, and the balance, with interest, payable semi-annually, in four equal annual installments, said deferred payments to be secured by first mortgage or deed of trust on said lands. The defendant's bid was accepted by the plaintiffs and reported to the court for confirmation. The sale was approved and plaintiffs ordered to execute and deliver deed to the defendant in compliance with his bid. The defendant is not willing to accept the deed and make payment unless he can be assured that a good and indefeasible fee-simple title to the property will be conveyed thereby. The parties, therefore, have submitted the question for determination on an agreed statement of the facts as authorized by C. S., 626, and stipulated that judgment should be entered for plaintiffs, or for the defendant, according to the view the court should take of the title offered.

Upon the facts appearing of record the court, being of opinion that the deed of the plaintiffs would convey a good and indefeasible title, rendered judgment for the plaintiffs, from which the defendant appeals, assigning errors.

Preston & Ross for plaintiffs.
Walter Clark for defendant.

Stacy, C. J. The title to the land in question was before the Court in *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25, where it was held that Garnett Jones Welch took a life estate in the property, under her mother's will, with contingent remainders to her children, living at her death.

The special proceeding appears to be regular, with all parties before the court, but appellant questions the power of the court to order a sale under C. S., 1744, without a jury finding that such would be to the best interest of all concerned, where the parties themselves do not agree to a sale.

We have held in a number of cases that the court has full power to order a sale for reinvestment under C. S., 1744, where the facts, as here, bring the case within the purview of the statute. *McLean v. Caldwell,* 178 N. C., 424, 100 S. E., 888; *Dawson v. Wood,* 177 N. C., 158, 98 S. E., 459; *Pendleton v. Williams,* 175 N. C., 248, 95 S. E., 500; *Thompson v. Rospigliosi,* 162 N. C., 145, 77 S. E., 113. See, also, *R. R. v. Parker,* 105 N. C., 246, 11 S. E., 328.

A private sale upon terms, when approved by the court, was sanctioned in *Dawson's case,* where it appeared that such was to the best interest of all concerned. The court was warranted in following a similar course in the special proceeding now under consideration. *McLean v. Caldwell, supra.*

Nor is the purchaser ordinarily chargeable with the duty of looking after the proper disposition of the purchase money. When he has paid his bid into court, or to the parties authorized by the court's decree to receive it, he is ordinarily "quit of further obligation concerning it." *McLean v. Caldwell, supra; Dawson v. Wood, supra; Pendleton v. Williams, supra.* In the special proceeding, presently under review, as was said in *Dawson's case,* proper safety of the fund can be taken care of in the final decree.

On the record, the judgment of the Superior Court is correct and will be upheld.

Affirmed.

W. H. YARBOROUGH, ON BEHALF OF HIMSELF AND ALL CITIZENS AND TAXPAYERS OF THE STATE OF NORTH CAROLINA, v. NORTH CAROLINA PARK COMMISSION.

(Filed 21 November, 1928.)

1. **Constitutional Law—Due Process of Law—Law of the Land—Construction and Operation of Fifth and Fourteenth Amendments.**

In construing the provisions of the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, section 17, of the State Constitution in relation to taking private property for a public use: *Held,* the terms "due process of law" and "the law of the land" are substantially identical terms, the Fifth Amendment being obligatory on the Federal Government and the Fourteenth Amendment being a restriction upon the several States.

2. **Eminent Domain—Delegation of Power—North Carolina National Park Commission.**

The North Carolina National Park Commission is an agency of the State created by statute, vested with the power of eminent domain, and not subject to the limitations provided in C. S., 1714, 1715.

3. **Same.**

The act creating the National Park Commission makes the commission an agency acting for the State to acquire lands for the establishment of the national park, and to vest the title in the State, and the position that a statute cannot confer on the Federal Government the right of condemnation is not affected by the further provision of the statute that the State may cede the lands so acquired to the Federal Government in consideration of the public interest of the people of the State in the establishment of the national park.

4. **Constitutional Law—Due Process of Law; Law of the Land—Eminent Domain—National Park—Injunctions.**

The exercise of the power of eminent domain by the North Carolina National Park Commission is not contrary to the "due process" clause of the Federal Constitution, Fourteenth Amendment, or Article I, section 17, of the State Constitution, since notice and an opportunity to be heard is provided for those whose land is to be taken, and this result is not affected by the power given in the statute to the Superior Court to enjoin the owner of such land from changing the existing condition or character of the land sought to be condemned, since the person against whom such relief is sought is given ample opportunity for the protection of his right by the requirements that the clerk issue summons, publish notice setting forth the filing of the petition, the name of the petitioner and of every person named in the petition, a brief description of the land, a statement of the relief demanded, and the return day of the summons, and until these provisions are complied with no final order or judgment can be entered, and then only upon such terms as may be just.

5. Same—Notice and Opportunity to be Heard.

The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives reasonable notice and a fair opportunity to be heard before the issues in condemnation proceedings are decided.

6. Same—Provision for Compensation.

The act incorporating the North Carolina National Park Commission in effect provides that the lands of private owners taken for its purpose shall not be acquired until an adequate sum is available for payment for the lands taken, and a restraining order will not issue upon the assumption that the landowners cannot be ultimately paid under this and other provisions of the act.

7. Eminent Domain—Proceedings to Take Property and Assess Compensation—Persons Who May Sue.

Only those whose interests in the particular lands sought to be taken for the national park contemplated by chapter 48, Public Laws of 1927, sec. 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the Federal Constitution and of Article I, section 17, of the Constitution of North Carolina.

8. Eminent Domain—Nature and Extent of Power—Public Use.

The provisions of our statute for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Const., Art. II, sec. 29.

9. Same.

The terms "public use" applied to the taking of private lands under condemnation is one for the ultimate determination of the courts in particular instances, and where so established that the use is public, the expediency or necessity for establishing the use is exclusively for the Legislature, subject to the restraint that just compensation shall be made.

10. Statutes—Enactment, Requisites, and Validity—Constitutional Requirements in Enactment—Public and Private Laws.

The act creating the North Carolina National Park Commission is a public act and does not fall within the purview of Article II, section 12, requiring notice that application to the General Assembly for the passage of a private act be made.

11. Taxation—Constitutional Requirements and Restrictions—Power to Lend Credit of State to Person, Association, or Corporation—North Carolina National Park Commission.

The statute establishing the North Carolina National Park Commission with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of Article V, section 4, of the State Constitution requiring the approval of the voters at an election.

APPEAL by plaintiff from an order of *Clement, J.,* made at October Term, 1928, of FORSYTH, sustaining a demurrer to the complaint.

The defendant is a corporation organized and existing under and by virtue of the laws of North Carolina. The purpose of its incorporation and the scope of its powers are set forth in the act by which it was created. Public Laws 1927, ch. 48. It is therein provided that to enable the defendant to accomplish its purpose and the State to avail itself of the provisions of an act of Congress approved 22 May, 1926, entitled "An act to provide for the establishment of the Shenandoah National Park in the State of Virginia and the Great Smoky Mountains National Park in the States of North Carolina and Tennessee, and for other purposes," and to provide a National Park with its attendant benefits to the entire State, the State Treasurer is authorized, empowered and directed to issue and sell bonds of the State in an amount not exceeding $2,000,000, to be designated "State of North Carolina Park Bonds." Section 5 contains these provisions: "Whenever the North Carolina Park Commission shall request the State Treasurer to make available a specified sum of money for the purposes for which bonds are herein authorized to be issued, it shall be the duty of the State Treasurer to issue bonds or bond anticipation notes pursuant to this act in an amount sufficient to raise the sum so requested."

It is alleged in the complaint that the Park Commission and the Governor and Council of State have made all findings and performed all conditions which are precedent to the issue and sale of the proposed bonds and bond anticipation notes; that the State Treasurer is ready upon request of the Park Commission to pay for the lands to be appropriated, and the Auditor is ready to issue his warrant; and that unless restrained the defendant will perform the duties imposed by the act of 1927 in order to acquire the necessary area and pay the necessary sums out of the funds provided for this purpose. It is further alleged that the defendant has adopted resolutions requesting the State Treasurer to make available the funds for which provision is made in the act of 1927, but has not certified the resolutions to the Treasurer who, though authorized thereto, has taken no action, and will not act in the premises unless the resolutions are certified.

It is alleged that the act of 1927 is unconstitutional for several reasons, but only those given in the appellant's brief are considered in the opinion.

As grounds of its demurrer the defendant says that paragraph 7 of the complaint contains only conclusions of law, and that paragraphs 1 to 6, both inclusive, do not state facts sufficient in law to constitute a cause of action.

The demurrer was sustained and the plaintiff excepted and appealed.

Efird & Liipfert for plaintiff.

Assistant Attorney-General Brooks, Carter & Carter, Varser, Lawrence, Proctor & McIntyre, Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

L. R. Varser, Assistant Attorney-General, and Thomas S. Rollins and Alfred S. Barnard, Amici Curiæ.

ADAMS, J. The demurrer admits only such relevant facts as are set forth in the complaint and such relevant inferences of fact as are deducible therefrom. It raises an issue of law, but it does not admit conclusions of law or matters of evidence or facts controverting those of which the Court must take judicial notice. *Whitehead v. Telephone Co.,* 190 N. C., 197; *Sexton v. Farrington,* 185 N. C., 339. It may be seen by reference to the statement of facts that the complaint and the demurrer present the question whether the statutes under which the defendant is proceeding (Laws 1927, ch. 48), are in conflict with the organic law of the State or Nation. If they are not, the judgment sustaining the demurrer is free from error; if they are, the demurrer should have been overruled. The case, then, is to be decided on specific constitutional objections.

The appellant contends that the act of 1927 was enacted in breach of the following clauses: "No person shall be deprived of life, liberty or property without due process of law." U. S. Constitution, Fifth Amendment. "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Ibid.,* Fourteenth Amendment. "No person ought . . . in any manner to be deprived of his life, liberty, or property, but by the law of the land." Constitution of N. C., Art. I, sec. 17. "Due process of law" and "the law of the land" are substantially identical terms. *Parish v. Cedar Co.,* 133 N. C., 479, 484.

There is a distinction between the cited clauses of the Fifth and Fourteenth Amendments of the Federal Constitution. The former is obligatory only on the United States—a restriction only on the Federal Government; the latter, only on the several States. *Hunter v. Pittsburg,* 207 U. S., 161, 52 Law Ed., 151; *Phillips v. Telegraph Co.,* 130 N. C., 513. So, the specific question is whether the act of 1927 conflicts with the provisions of the Fourteenth Amendment or with those of Article I, sec. 17, of the Constitution of North Carolina.

As a rule this objection can be urged only by a person whose legal right has been affected against the party or a representative of the party who commits or causes the injury. The plaintiff has no interest in any of the land alleged to be subject to condemnation; he has not suffered and is not threatened with loss of property. When a plaintiff is permitted to sue for the benefit of another he must show an interest personal to himself. A party who is not personally injured by a statute is not permitted to assail its validity; if he is not injured he should not complain because another may be hurt. *Tyler v. Judges, etc.,* 179 U. S., 405; 45 Law Ed., 252; *McCabe v. Atchison, etc., Ry. Co.,* 235 U. S., 162, 59 Law Ed., 169, 174; *Coble v. Comrs.,* 184 N. C., 342, 354. The issue which the appellant attempts to raise in this way is to be determined in such proceedings as may be instituted by the defendant against the owner for the condemnation of his property.

The assigned objection, even if the plaintiff could take advantage of it, is without merit because it does not rest on any strict legal rights. True, it is provided in section 27 that at any time after summons is issued a judge of the Superior Court, if of opinion that the defendant in a proceeding for condemnation is engaged, or is likely to be engaged in an act which will change the existing condition or character of the land sought to be condemned, may issue a restraining order without bond and that the State shall be under no obligation or liability for the payment of damages. No doubt the latter clause was inserted on the theory that the State cannot be sued without its consent; but section 27 further provides that the restraining order shall be issued upon such terms as may be just. The obvious purpose of this provision is to protect the owner of the land and to see that no injustice is done him. The means of protection is a matter for the judge to devise. It is subject to grave doubt whether damage is done in the sense of taking property by arresting the destruction of primitive forests until the defendant can decide whether it shall undertake to appropriate the land covered by such forests for the purposes contemplated by the statutes under consideration; but we were informed on the argument here that the defendant has stated of record that it will provide for the protection of the landowners such security as the judge may deem adequate—such as will be sufficient amply to indemnify against loss.

The defendant is an agency of the State. It is vested with the power of eminent domain, but is not subject to the limitations prescribed in Consolidated Statutes 1714 and 1715. Yet, in addition to issuing the summons the clerk must publish a notice setting forth the filing of the petition, the name of the petitioner and of every other person named in the petition, together with a brief description of the land, a statement of the relief demanded, and the return day of the summons. Section 19. Until the provisions of this section are complied with no final order or judgment shall be entered. When they are observed, and when the judge issues his restraining order upon such terms as may be just, thereby affording ample protection against loss, the landowner cannot complain that he is denied the equal protection of the laws or that his property is taken without due process of law in violation of the Fourteenth Amendment or of Article I, sec. 17, of the Constitution of North Carolina. The Fourteenth Amendment does not undertake to control the power of a State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives reasonable notice and a fair opportunity to be heard before the issues are decided. *Ex parte Kemmler,* 136 U. S., 436, 34 Law Ed., 519; *Hallinger v. Davis,* 146 U. S., 320, 36 Law Ed., 986; *Allen v. Georgia,* 166 U. S., 141, 41 Law Ed., 949. In *Hurtado v. California,* 110 U. S., 516, 28 Law Ed., 232, it is said that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law; and in *Missouri Pac. R. Co. v. Humes,* 115 U. S., 520, 29 Law Ed., 463: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

In reference to Article I, sec. 17, it is enough to say that the Legislature had the right to delegate to the defendant the power of eminent domain. "The right of the public to private property, to the extent that the use of it is needful and advantageous to the public must, we think, be universally acknowledged. Writers upon the laws of nature and nations treat it as a right inherent in society. There may, indeed, be abuses of the power, either in taking property without a just equivalent, or in taking it for a purpose really not needful or beneficial to the community; but when the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriated to individuals again dedicated to the service of the State, is a power useful and necessary to every body politic." *R. R. v. Davis,* 19 N. C., 451. Machinery is provided for determining the measure of compensation to which the owner of the property taken may be entitled, and the purpose to which the property so taken is to be appropriated is, as hereafter pointed out, unquestionably a public purpose.

The appellant's second objection, as set out in his brief, is this: The act of 1927 is unconstitutional for the reason that it does not provide a fund adequate to pay for such lands as the Park Commission proposes to condemn, and that in fact no provision has been made for the payment of damages. We give this abridged statement of the argument: The doctrine that private property cannot be taken for public use without just compensation implies that the owner shall receive the market value of his property; precedent to "just compensation" are an adequate fund and an appropriate remedy to enforce its application; payment need not precede the taking, but provision for compensation must be definite, leaving open to litigation nothing but the title and the quantum of damages; the fund provided ($2,000,000) is vastly inadequate to pay for the lands which are within the scope and contemplation of the act.

The argument is met by what we have said in regard to the appellant's want of personal interest in this phase of the controversy; but, without reference to this, there are other facts which we deem to be conclusive. Section 26 provides that no part of the funds to be derived from a sale of the bonds shall be expended until it shall have been made to appear to the Commission, and found as a fact by the Governor and Council of State, that adequate financial provision has been made to purchase that portion of the proposed area which lies within the State of North Carolina. It is alleged in paragraph four of the complaint that this finding of fact has been made. The allegation is equivalent to the admission of a legislative determination that an adequate fund has been secured. The bonds are not the only source from which the fund is to come. The Federal act declares that the Secretary of the Interior on behalf of the United States may accept title to lands to be purchased with money subscribed by the Great Smoky Mountains, Incorporated, (North Carolina), and with other contributions. 16 U. S. Code, Annotated, Cumulative A. P. P., 1927. In addition the Laura Spellman Rockefeller Memorial Fund has agreed to contribute an amount equal to the total contributions of North Carolina and Tennessee up to five million dollars. Under these circumstances we cannot hold as a conclusion of law that ample provision has not been made for awarding "just compensation" to those whose property may be appropriated to the public use. The defendant says that in any event the faith of the State is a sufficient guaranty of payment. *In re Manderson,* 51 Fed., 501; *Shoemaker v. U. S.,* 147 U. S., 282, 302, 37 Law Ed., 170; *U. S. v. Gettysburg E. Ry. Co.,* 160 U. S., 668, 40 Law Ed., 576.

It is next insisted that the act of 1927 is a private law, the enactment of which is prohibited by Article II, section 29, of the State Constitution; also that no notice was given that application would be made to the General Assembly for the passage of the act as required by Article II, section 12. This position cannot be maintained. The act is public, not private. A public statute is a universal rule which regards the whole community as distinguished from one which operates only upon particular persons and private concerns. It is usually applicable to all parts of the State, but a statute will not be deemed private merely because it extends to particular localities or classes of persons. 25 R. C. L., 763; *S. v. Chambers,* 93 N. C., 600. Moreover, the inhibition in section 29 applies only to the classes of private acts therein specified and not to the purposes designated in the statutes which the appellant assails. If the act were within the purview of section 12 its ratification by the General Assembly would raise the conclusive presumption that the required notice had been given. *Cox v. Commissioners,* 146 N. C., 584; *Gatlin v. Tarboro,* 78 N. C., 119; *Brodnax v. Groom,* 64 N. C., 244.

The appellant's contention that the General Assembly cannot vest in the Federal Government the power of eminent domain is based upon an erroneous assumption. The act in question does not purport to confer such power. In section 18 the defendant, as an agency of the State, is given the power to acquire land and other property, not for itself, but in the name of and in behalf of the State of North Carolina. As an individual entity or a corporate body the defendant cannot acquire title to land by instituting a proceeding for condemnation. It is exclusively an agency of the State; it may acquire title only in the name of the State. Section 3. This provision is not impaired by the fact that the State is authorized to cede the acquired property to the Federal Government in consideration of the public benefit to be derived from the establishment of a National Park. There is no transfer of sovereignty from the State to the Federal Government. The State Constitution is not a grant, but a restriction of powers, no clause of which prohibits the power of condemnation as authorized by the recent act. The Great Smoky Mountains National Park cannot be "established, dedicated, and set apart as a public park for the benefit and enjoyment of the people" until title to the lands within the designated area is vested in the United States in fee simple. The method provided for the final vesting of the title is about the only one available to the State. The land covered by some of the National Parks, such as the Sequoia, Yosemite, Mesa Verde, Crater Lake, Wind Cave, Glacier and others, was reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States; but land sought for the Great Smoky Mountains National Park is held by private owners. Under the doctrine of eminent domain the title may be acquired on behalf of the State and then by legislative and congressional assent it may be transferred to the United States.

Nor can we concur in the assertion that the purpose for which the bonds are to be issued is not a public purpose, conceding for the moment that the plaintiff as a resident taxpayer may present the question for decision. *Stratford v. Greensboro,* 124 N. C., 127, 133. It is not easy to frame a definition of the term "public use" which would be of universal application, but it is settled by our decisions that whether a use is public is for the ultimate decision of the courts and that if a particular use is public the expediency or necessity for establishing it is exclusively for the Legislature. *Cozard v. Hardwood Co.,* 139 N. C., 283; *Jeffress v. Greenville,* 154 N. C., 491; *Rindge Co. v. Los Angeles Co.,* 262 U. S., 700, 67 Law Ed., 1186. In his work on Eminent Domain Lewis says: "Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application."

One class of cases defining a public use includes those in which the United States, a State, or a municipal corporation seeks to acquire land on which to carry on its proper public functions or to perform some act directly enhancing the security or health of the community. Nichols, The Power of Eminent Domain, section 211. In accordance with these principles the power of eminent domain has been exercised by taking private property for highways, railways, streets, playgrounds, memorial halls, monuments, statues, public buildings and many other similar purposes. Those which are primarily aesthetic are not excluded. The old doctrine that land could be taken only when needed by the public for necessary purposes is now little more than a theory or a canon of construction. In *Shoemaker v. United States,* 147 U. S., 282, 297, 37 Law Ed., 170, 184, it is said that a proposition to take private property, without the consent of the owner, for a public park would formerly have been regarded as a novel exercise of legislative power, but now the validity of legislative acts erecting such parks and providing for their cost is uniformly upheld. "The park principle has been gradually extended far beyond the original notion of breathing spaces in congested parts of populous cities. It has already been pointed out that pleasure drives may be laid out. Land may be taken by a city for a park outside the city limits. Vast tracts of uninhabited woodland, or spots made beautiful by nature, may be taken for State or National parks, and the whole site of a famous battle may be reserved. It is apparent that pleasure and sentiment must be the principal factors in justifying such takings." Nichols, The Power of Eminent Domain, section 233.

These principles are supported in *Cozard v. Hardwood Co., supra; Hudson v. Greensboro,* 185 N. C., 502; *Hinton v. State Treasurer,* 193 N. C., 496; *Lancey v. King Co.,* 34 L. R. A., 817; *Pontiac Imp. Co. v. Cleveland Park District,* 23 A. L. R., 866; *United States v. Gettysburg Electric Ry. Co.,* 60 U. S., 668, 40 Law Ed., 576; *Clark v. Nash,* 198 U. S., 361, 49 Law Ed., 1085; *Rindge Co. v. Los Angeles Co., supra.*

As the use contemplated by the act of 1927 is a public use, the extent to which property shall be taken for such use rests in the discretion of the Legislature, subject to the restraint that just compensation shall be made. *Shoemaker v. U. S., supra; U. S. v. Gettysburg Electric Ry. Co., supra.*

The appellant finally contends that the act of 1927 is in conflict with the following clause in Article V, section 4, of the Constitution of North Carolina: "The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation except to aid in the completion of such railroads as may be unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State and approved by a majority of those who shall vote thereon."

This section has been construed as an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision. *Lacy v. Bank,* 183 N. C., 373, 379. The statutes referred to do not purport in terms or in spirit to give or lend the credit of the State in aid of "any person, association, or corporation" embraced in the inhibition. The Park Commission is neither such a municipal nor such a private corporation as is described in the seventh and eighth articles of the Constitution. It is obvious, then, that the State is acting on its own behalf through an agency ordained by the legislative department of the State Government; and herein lies the distinction between the act under which the North Carolina Park Commission was established (Laws 1927, ch. 48) and the act authorizing the World War Veterans Loan (Laws 1925, ch. 155), under which the question of contracting a bonded indebtedness was submitted to the voters of the State. The judgment sustaining the demurrer is

Affirmed.

EUGENE C. PRATT AND WIFE, SALLIE G. PRATT, v. AMERICAN BOND AND MORTGAGE COMPANY.

(Filed 21 November, 1928.)

1. **Usury—Usurious Contracts and Transactions—Construction of Transactions as Usurious.**

In construing a transaction with regard to our usury statutes the courts will look to its substance and not to its form. C. S., 2306.

2. **Same—Nonsuit.**

Where there is evidence that the maker gave his note to the payee who, in accordance with a previous agreement, endorsed it to the defendant, who paid to the maker a less sum than the face value of the note, and that the maker, upon maturity of the note, paid to the endorsee defendant the full face value of the note, together with interest thereon at the rate of six per cent, and that the maker received nothing from the payee in exchange for the note, but that the payee was used for the purpose of circumventing the provisions of our usury statute, C. S., 2306: *Held*, the evidence is sufficient to establish a usurious transaction, and a motion as of nonsuit thereon is properly denied.

APPEAL by defendant from *McRae, Special Judge,* at May Term, 1928, of FORSYTH. No error.

Civil action to recover statutory penalties for usury charged by defendant and paid by plaintiffs. C. S., 2306. Two causes of action, each founded upon a separate and distinct transaction, are alleged in the complaint.

The issues submitted to the jury were answered as follows:

1. Did the defendant knowingly take, charge and receive from the plaintiffs a greater rate of interest than six per cent on a loan of money to the plaintiffs, as alleged in the plaintiff's first cause of action? Answer: Yes.

2. What amount, if any, are plaintiffs entitled to recover of defendant as penalty for usury on the first cause of action? Answer: Twice the amount—$250.

3. Did the defendant knowingly take, charge and receive from the plaintiffs a greater rate of interest than six per cent on a loan of money to the plaintiffs, as alleged in the second cause of action? Answer: Yes.

4. What amount, if any, are plaintiffs entitled to recover of defendant as penalty for usury on the second cause of action? Answer: $2,253.20.

From judgment on the verdict that plaintiffs recover of defendant the sum of $2,503.20, defendant appealed to the Supreme Court.

Parrish & Deal for plaintiffs.

Benbow, Hall & Benbow and Manly, Hendren & Womble for defendant.

CONNOR, J. On 27 February, 1926, plaintiffs executed their note for the sum of $1,000, payable to the order of Harry Grimsley, and due twelve months after date, with interest from date at six per cent. This note, endorsed by Harry Grimsley, without recourse, was immediately after its execution delivered to defendant. Defendant thereupon paid to plaintiffs on account of said note the sum of $900. Plaintiffs received nothing for said note from Harry Grimsley; no consideration passed from Harry Grimsley to them for said note. Plaintiffs received from defendant for said note only the sum of $900.

The evidence tended to show that the foregoing transaction was had pursuant to an agreement entered into by and between plaintiffs and defendant, prior to the execution of said note. Defendant agreed to lend to plaintiffs the sum of $900. Plaintiffs agreed to pay to defendant, for the use of said sum of money, $100 and interest on $1,000, at six per cent from the date of said note until the same was paid. The note was executed by plaintiffs in accordance with instructions of defendant, for the purpose of evading, prima facie, the provisions of C. S., 2306, which are as follows:

"The taking, receiving, reserving, or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives, or corporation by whom it has been paid may recover back twice the amount of the interest paid, in an action in the nature of an action for debt."

On 10 September, 1926, in discharge of their liability on said note, plaintiffs paid to defendant the sum of $1,000, with accrued interest thereon at six per cent, thus having paid to defendant interest on a loan of money at a rate greater than six per cent.

Plaintiffs' first cause of action alleged in their complaint is founded upon the foregoing transaction. On its appeal to this Court defendant concedes that there was no error in the refusal by the trial court to allow its motion for judgment as of nonsuit, upon the first cause of action. Defendant has abandoned all its exceptions appearing in the case on appeal relating to the trial of the first and second issues. There was no error in the trial with respect to these issues, which involve the transaction upon which the first cause of action alleged in the complaint is founded.

On 20 September, 1926, plaintiffs executed their note for $6,500, payable to the order of Sapp & Grogan, and due twelve months after date, with interest from date at six per cent. This note endorsed by Sapp & Grogan was immediately after its execution delivered to defendant. Defendant thereupon paid to plaintiffs or to their order the sum of $5,850. Of said sum, $1,250 was applied to the satisfaction and discharge of liens on the property conveyed by plaintiffs by deed of trust to secure the payment of their note for $6,500, and the balance, to wit, $4,600, was paid to Sapp & Grogan, who applied the said sum as a payment on the indebtedness of plaintiffs to them, leaving a balance due on said indebtedness.

Plaintiffs were not credited by Sapp & Grogan with the amount of their note, to wit, $6,500; they were credited only with the sum of $4,600. They received nothing from Sapp & Grogan for said note. They received only the sum of $5,850 for their note, payable to Sapp & Grogan and by said payees transferred, by endorsement, to defendant. Said sum of $5,850 was paid by defendant, and applied to the payment of indebtedness due by plaintiffs to Sapp & Grogan and to other creditors.

There was evidence tending to show that the foregoing transaction was had pursuant to an agreement entered into by and between plaintiffs and defendant, prior to the execution of said note; that defendant agreed to lend to plaintiffs the sum of $5,850; and that plaintiffs agreed to pay to defendant for the use of said sum of money $650, and interest on $6,500 at six per cent from the date of said note until the same was paid. The note was executed by plaintiffs in accordance with instructions of defendant for the purpose of evading prima facie the provisions of C. S., 2306.

On 10 December, 1927, in discharge of their liability as makers of the note for $6,500, plaintiffs paid to Sapp & Grogan the sum of $6,500, with accrued interest at six per cent. Sapp & Grogan paid to defendant the amount due on said note, in discharge of their liability as endorsers of said note. There was evidence tending to show that Sapp & Grogan paid the amount due on said note with funds provided by plaintiffs.

There was evidence on behalf of defendant tending to show that defendant declined to lend, and did not lend to plaintiffs any sum of money whatever upon their application for a loan of $6,500; that the note for $6,500 was executed by plaintiffs, payable to the order of Sapp & Grogan, because plaintiffs were then indebted to Sapp & Grogan in a sum in excess of $6,500; and that Sapp & Grogan thereafter, and not pursuant to any prior agreement between plaintiffs and defendant, sold and transferred, by their endorsement, said note to defendant. There was evidence tending to show further that plaintiffs failed to pay said note when same became due, and that Sapp & Grogan paid the said note to defendant, because of their liability thereon as endorsers, and that plaintiffs thereafter reimbursed Sapp & Grogan for the amount paid by them to defendant. The uncontradicted evidence, however, was to the effect that plaintiffs received only the sum of $5,850 on account of their note, and that they paid for the use of said sum of money interest at a greater rate than six per cent. This interest was paid by plaintiffs and received by defendant, and not by Sapp & Grogan.

In view of the conflict in the evidence with respect to the transaction upon which plaintiff's second cause of action was founded, there was no error in the refusal of defendant's motion for judgment as of nonsuit. There was evidence tending to sustain plaintiff's contention that notwithstanding the form of the transaction, it was in reality a loan of money by defendant to plaintiffs upon an agreement by plaintiffs to pay to defendant, for the use of said money, a sum in excess of interest at the rate of six per cent per annum, and that such sum was in fact paid by plaintiffs and received by defendant, with knowledge that said transaction was usurious. The principle is well settled that "when a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form, or outward appearance of the transaction, in order to determine what it in reality is. If this were not so, the usury laws of this State would be easily evaded by lenders of money who would exact from borrowers, with impunity, compensation for money loaned in excess of interest at the legal rate." *Ripple v. Mortgage Corp.,* 193 N. C., 422, 137 S. E., 156.

In *Carter v. Brand,* which was an action to recover the statutory penalty for usury charged and received, there was a judgment for the plaintiff, rendered by the Court of Conference of this State, at June Term, 1800. In his opinion in that case, reported in 1 N. C., at page 255, *Taylor, J.,* says: "Every case arising upon the act of Assembly to restrain excessive usury must be viewed in all its circumstances, so as to ascertain the real intention of the parties. If that be corrupt in the substance and design, no pretext however plausible, no contrivance however specious, no coloring however artful, with which the transaction is veiled, will secure it from the censure of the law." Again, in *Bank v. Wysong,* 177 N. C., 284, 98 S. E., 769, *Walker, J.,* says: "The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be paid or received is usurious."

Upon the facts found by the jury from the evidence in this case, the principle upon which *Collier v. Nevill,* 14 N. C., 30, was decided, is not applicable. In that case the bond upon which the action was brought was executed by defendants upon a bona fide consideration, moving from the obligees to the defendant, as obligors. Afterwards, the obligees sold the bond to the plaintiff at a greater discount than six per centum per annum, and by their endorsement bound themselves for its full amount. It was held that the defense of usury was not available, upon these facts, to defendants, and that they were liable to plaintiff as assignee for the full amount of the bond, notwithstanding that plaintiff would receive for the use of his money a sum in excess of interest at six per cent. There was no usurious transaction between plaintiff, the assignee of the bond, and defendants, the obligors therein. If the jury had found the facts in the instant case as defendant contended, the principle upon which *Collier v. Nevill* was decided would have been applicable. The court so instructed the jury.

The distinction between the instant case and *Collier v. Nevill* is clearly shown by the decision of this Court in *Sedbury v. Duffy,* 158 N. C., 432, 74 S. E., 355. In that case the makers of the note had received full value therefor from the payee. They were held liable for the amount of the note and interest to the plaintiff, who had purchased the note from the payee, at a discount which exceeded six per cent per annum. It was held, however, that as between the payee, who had endorsed the note, when he sold the same to the plaintiff, and the plaintiff, the defense based upon the plea of usury was available. The maker of a note who has received full value for the same from the payee, cannot recover the statutory penalty for usury from the assignee or endorsee, who has purchased the note from the payee at a discount exceeding six per centum per annum. As between the maker and the assignee or endorsee there is no usurious transaction, which is subject to the statutory penalties. It is otherwise, however, as between the endorsee and the endorser, who becomes liable by his endorsement for the amount due on the notes. As between them, the transaction is a loan of money, and if more than six per cent per annum is knowingly charged, the transaction is usurious.

There was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. We have examined the other assignments of error relied upon by defendant upon its appeal to this Court. They cannot be sustained. The judgment is affirmed. There is

No error.

BEN J. MASSEY, ADMINISTRATOR, v. NORTH CAROLINA PUBLIC SERVICE COMPANY AND HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY.

(Filed 28 November, 1928.)

1. **Torts—Release from Liability Therefor—Joint Tort-feasors.**

A release of one joint *tort-feasor* from damages caused by wrongful death ordinarily releases both of them from liability for the joint tort.

2. **Same.**

Where a release from damages for a wrongful death is procured by one joint *tort-feasor* from the administrator of the deceased, who is fully informed of its effect and was not under any disadvantage, it will inure to the benefit of the other *tort-feasor*, and in the absence of fraud, the release is valid and binding on the administrator as to both *tort-feasors*.

3. **Torts—Release from Liability Therefor—Fraud in Procurement—Representations of Law.**

Representations of the defendant that the plaintiff could not recover in an action for damages for wrongful death is one of legal inference, and ordinarily is not evidence of fraud sufficient to set aside a release from liability for a negligent act.

CIVIL ACTION, before *Townsend, Special Judge,* at May Term, 1928, of UNION.

The plaintiff is the father and administrator of his son, LeRoy Massey, and instituted this action to recover for wrongful death. Plaintiff sued the North Carolina Public Service Company, and this defendant filed an answer pleading as a defense a release executed by plaintiff on 29 July, 1927, releasing the defendant railroad company from all liability for the killing of plaintiff's intestate. Thereupon plaintiff, upon motion and order, had the railroad company made a party defendant to the suit and alleged that the release relied upon was secured by means of fraud and false representation on behalf of said railroad company.

The evidence tended to show that plaintiff's intestate was employed by the High Point, Thomasville and Denton Railroad Company, and that on or about 12 July, 1927, plaintiff's intestate and other employees of defendant railroad were moving a steam shovel owned by the railroad through the streets of High Point. The steam shovel was about sixteen feet high. Upon reaching the junction of West Green and Grimes streets it became necessary to pass under a wire owned by the Public Service Company which extended across the street from an arc light in the center of the street. The wire was stretched about fourteen feet from the ground, and would therefore strike the steam shovel about two feet from the top of the smokestack. Thereupon the agent of the railroad company in charge of said shovel directed plaintiff's intestate to take a stick and hold the wire up so that the steam shovel could pass thereunder. The wire was without insulation at that point, and this fact was known to the operator of the steam shovel. Plaintiff's intestate in an effort to execute the order given him by his foreman, raised the wire on the end of a stick, but in some way the wire slipped off the end of the stick and came in contact with plaintiff's hand and killed him. Thereafter, about 27 July, a claim agent of defendant railroad came to see plaintiff and found him working in the field. Mr. Plyler, the landlord of plaintiff, came with the claim agent. The plaintiff offered evidence to the effect that the agent offered him $1,000 in settlement for the death of his son. Plaintiff's narrative of the occurrence is as follows: "I said, 'A thousand dollars ain't no money for my boy,' and he said, 'Well, if you go into a case about it, you won't get anything,' and he says, 'That is all the company will allow us to give you,' and I says to Mr. Plyler, 'Will a thousand dollars do?' and he says, 'I don't know, Preacher, but rather than be out of it all, I would take that.' The claim agent further said: 'Put it in law, and you won't get anything; you will have enemies of white and colored,' and I says, 'I don't want any enemies among my white friends, because that's all I got to depend on—my white friends.' He said I wouldn't get anything, because he had been around the courts enough to know."

Thereafter the plaintiff, together with his landlord, Mr. Plyler, and the claim agent, went to Monroe to an attorney's office. The plaintiff was advised by the attorney that it would be necessary for him to qualify as administrator of his son in order to sign the release. The proper papers were prepared, and the plaintiff, and Mr. Plyler, the landlord, and the stenographer of the attorney went to the clerk's office and plaintiff was duly qualified as administrator of his son. Immediately thereafter they returned to the office of the attorney who had prepared the release. Plaintiff testified that when the attorney prepared the release, and before he signed it, the attorney "read every word of it to me and fully explained to me that that meant a full settlement of the case. He told me I could never come back any more, and that ended it, and that it would be all that I would ever get. He read it over to me and told me when I signed it that I would sign all my right away as to any claim I had against anybody, and I signed it and took the money."

At the conclusion of the evidence the trial judge sustained a motion of nonsuit and the plaintiff appealed.

W. B. Love and H. B. Adams for plaintiff.

John C. Sikes for North Carolina Public Service Company.

P. W. Garland for High Point, Thomasville and Denton Railroad Company.

BROGDEN, J. There was sufficient evidence of negligence to be submitted to the jury. The evidence clearly discloses that both defendants were joint *tort-feasors* in producing the death of plaintiff's intestate. The ultimate question, therefore, is whether or not there was any evidence of fraud in procuring the release, because a release of one joint *tort-feasor* ordinarily releases all. *Braswell v. Morrow,* 195 N. C., 127.

The evidence does not disclose that the release was secured by means of concealment or artifice. All of the negotiations between the parties took place in the presence of Mr. Plyler, who advised plaintiff to accept the settlement, and who plaintiff testified "was a good friend of mine." The release was correctly read and thoroughly explained to the plaintiff before he signed it. It is true that there is evidence that the claim agent told the plaintiff he could not recover in a lawsuit, but this is not such a representation as the law denounces as a badge of fraud. Indeed, the representations might well be considered as representations of law and not of fact. Under ordinary circumstances such representations do not create a cause of action. *Parker v. Bank,* 152 N. C., 253, 67 S. E., 492.

A close examination of the proof does not disclose evidence of fraud in the procurement of the release, and the judgment must stand. *Butler v. Fertilizer Co.,* 193 N. C., 632, 137 S. E., 813; *Sherrill v. Little,* 193 N. C., 736, 138 S. E., 14.

Affirmed.

S. P. McCLESTER AND PATTERSON MANUFACTURING COMPANY v. THE TOWN OF CHINA GROVE.

(Filed 28 November, 1928.)

Municipal Corporations—Public Improvements—Assessments Therefor.

Where in accordance with the provisions of C. S., 2710(1), the board of aldermen grant a petition for street improvements requesting the assessment of a larger proportion of the cost of the improvements against the lots of land abutting directly thereon than is otherwise required by statute. after the confirmation of the assessment roll a subsequent board of aldermen is without power to grant a petition of the abutting landowners for a reduction of the assessment upon the ground alone that the amount of the assessments exceeded that they had originally anticipated, and a suit by other taxpayers of the town to enjoin the granting of such petition is proper. C. S., 2715, and 3 C. S., 2806(f), have no application.

APPEAL by plaintiffs from *Webb, J.,* at Chambers, Salisbury, 7 May, 1928. From ROWAN.

Civil action to restrain the defendant from refunding or rebating to abutting property owners part of an assessment duly and regularly made for street improvements.

On 30 June, 1925, a majority of the owners of property abutting on Main Street in the town of China Grove, who represented also a majority of the lineal feet of frontage of the lands abutting on said street, duly filed a petition with the board of aldermen of said town, requesting that Main Street be improved, and stipulating "that in the event said board of aldermen shall put in said pavement as above stated, then we, the undersigned, agree to pay for the same according to our respective frontage abutting on said street." Whereupon, on 4 August, 1925, the board of aldermen, after observing the preliminary requirements of the statutes, duly passed a resolution creating a local improvement district along Main Street in said town and ordered "that one hundred per centum of the costs of said improvements (less street intersections) be assessed upon the abutting property owners as provided in Article 9, chapter 56, of the Consolidated Statutes and acts amendatory thereof."

The assessments were properly made; no exceptions or objections were filed thereto; and no appeal was taken from the order confirming the assessment roll.

Thereafter, on 10 February, 1928, about forty of the owners of property abutting on Main Street who had not paid their assessments in full, petitioned the new board of aldermen of said town for a reduction or rebate of 25 per cent of the original assessments, for the reason that the total cost of the improvements was more than they had originally anticipated. This request was granted; whereupon, plaintiffs, property owners and taxpayers in the town of China Grove, bring this action to prohibit the carrying out of such reduction or rebate.

A temporary restraining order was entered in the cause, but dissolved upon the return thereof, from which ruling the plaintiffs appeal, assigning error.

W. H. Beckerdite and Hayden Clement for plaintiffs.
R. Lee Wright for Town of China Grove.
W. H. Woodson for abutting property owners.

Stacy, C. J., after stating the case: The regularity of the proceeding whereby the local assessment district on Main Street in the town of China Grove was created is not attacked; in fact it is conceded.

The question for decision is whether the new board of aldermen, under the circumstances disclosed by the record, had the authority or power to grant a reduction or rebate of 25 per cent of the original assessments. We think not.

It is provided by C. S., 2710(1), that one-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specifically assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon, by an equal rate per foot of such frontage, unless, as in the instant case, the petition for such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be assessed against the lots and parcels of land abutting directly on the improvement, in which case such larger proportion shall be so assessed, and the remainder of such cost, if any, shall be borne by the municipality at large. Here, the total amount of cost, required of the municipality, was assessed against the lots and parcels of land abutting directly on said improvement, in response to the request of the petition and in accordance with the provisions of the statute, hence we think the new board of aldermen was without authority to grant a reduction or rebate of 25 per cent of the original assessments, long after the confirmation of the assessment roll, there being no suggestion of any irregularity in the proceedings. *Gallimore v. Thomasville,* 191 N. C., 648, 132 S. E., 657.

True, it is provided by C. S., 2715 and 3 C. S., 2806(f) that the governing body of a municipality may correct, cancel or remit any assessment made for local improvement, including interest or penalties thereon, and shall have the power, when in its judgment there is any irregularity, omission, error or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment, make a reassessment, etc., but these statutes, we apprehend, have no application to a fact situation similar to the one now under consideration. *Gallimore v. Thomasville, supra.*

There was error in dissolving the injunction and dismissing the action.

Error.

W. R. STROUPE v. SUSIE C. TRUESDELL.

(Filed 28 November, 1928.)

Deeds and Conveyances—Construction—Restrictions—Equity.

Under a restriction in a deed that only one residence should be erected in a land development, the erection of an apartment-house will not be enjoined when it is inequitable to do so owing to the growth of the city around the *locus in quo* and the erection of stores and other business buildings surrounding it. *Higgins v. Hough,* 195 N. C., 652, cited as controlling.

APPEAL by plaintiff from *Harding, J.*, at October Term, 1928, of MECKLENBURG.

Civil action to enjoin the erection of an apartment-house on defendant's lot as being in violation of restrictive covenants contained in deeds conveying said property.

The fact situation is as follows:

1. The plaintiff owns a lot of land in the city of Charlotte, situate on Wriston Avenue, and the defendant is the owner of a lot located on East Morehead Avenue. The two lots are a couple of blocks apart. Both lots were originally owned by the Charlotte Consolidated Construction Company.

2. The defendant holds title to her lot under a deed containing certain restrictive covenants, which run with the land, and among which appears the following:

"The lot of land hereby conveyed shall be used for residential purposes only, and not otherwise, and shall be owned, occupied and used only by members of the white race (domestic servants in the employ of said occupants excepted); and there shall not at any one time be more than one residence or dwelling-house on said lot (servants' houses excepted), which residence or dwelling shall be of the type commonly known as a 'one-family dwelling.' "

3. It is alleged that a number of lots in the vicinity of defendant's property have been conveyed with similar restrictions, but it is not alleged that such deeds were executed in pursuance of a general plan or scheme. It does not appear that plaintiff's lot is so restricted.

4. The defendant proposes to erect on her property an apartment-house "containing a great number of apartments," which plaintiff seeks to enjoin as violative of the covenant above set out.

5. In the finding of facts made by the trial court, it appears that an eight-story apartment-house, containing eighty apartments, has been constructed on a lot immediately adjacent to defendant's property, as well as a number of individual garages and a filling station, which have been in use for more than two years; that the Charlotte Women's Club has been erected within 500 feet of defendant's lot; that the Addison Apartment House and a filling station stand within 200 feet, and adjacent to said filling station, three stores have been erected, two of which are occupied by merchants, the third being vacant, and a few hundred feet away the Domestic Laundry Building has been erected for use as a laundry; and that another apartment-house and a church are to be built on lots about 300 feet distant from defendant's property.

6. It was further found by the trial court that the character of the community has been essentially and fundamentally changed by the expansion of the city and the spread of industry, and that the restrictions

above mentioned have been so universally disregarded as to indicate a purpose and intention on the part of the residents of the immediate community no longer to regard it as an exclusive residential section, making it undesirable and unprofitable to insist upon said restrictions being observed. The court further found as a fact that it would be inequitable and unjust to require the defendant longer to observe said restrictions, and dismissed the temporary restraining order originally entered in the cause. Plaintiff appeals, assigning error.

B. S. Whiting for plaintiff.
Robert A. Wellons for defendant.

STACY, C. J., after stating the case: It may be doubted as to whether the plaintiff has alleged or shown facts sufficient to entitle him to insist upon an observance of the restrictions contained in deeds going to make up the defendant's paper chain of title, even if such restrictions were still subsisting and enforceable; but, however this may be, we think the case is controlled by the decision in *Higgins v. Hough,* 195 N. C., 652, 143 S. E., 212. There, it was said with respect to a lot in the same locality, that similar or identical restrictions, by reason of the changed conditions, are no longer enforceable in equity. The judgment will be affirmed on authority of the *Higgins case,* which follows *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 408.

Affirmed.

W. R. STROUPE v. W. K. MEDERNACH.

(Filed 28 November, 1928.)

Deeds and Conveyances—Construction—Conditions and Restrictions.

A restrictive covenant in a deed that only residences or dwelling-houses shall be erected in a scheme for developing a large area of lands, subdivided into lots, including the lot in question, does not exclude apartment-houses from being erected thereon. *Construction Co. v. Cobb,* 195 N. C., 690, cited as controlling.

APPEAL by plaintiff from *Townsend, Special Judge,* at September Special Term, 1928, of MECKLENBURG.

Civil action to enjoin the erection of an apartment-house on defendant's lot as being in violation of restrictive covenants contained in deeds conveying said property.

The material allegations of the complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. In 1922 the Charlotte Construction Company divided a tract of land in Mecklenburg County into lots and blocks of various sizes, with a view to selling same for residential purposes, prepared and recorded a map, or plat, showing the general plan or scheme, and sold many of said lots, including the one now owned by the defendant, with certain restrictive covenants relative to their use and occupancy, chief among which is the following:

"The lot of land hereby conveyed shall be used for residential purposes only, and not otherwise, and shall be owned, occupied and used by members of the white race (domestic servants in the employ of said occupants excepted), and there shall not at any one time be more than one residence or dwelling-house on said lot (servants' houses excepted)."

2. These restrictions were inserted in the deeds conveying the lots, shown upon the map, as covenants running with the land.

3. The plaintiff is the owner of a lot of land situate in the same subdivision and in the neighborhood of the defendant's property.

4. Upon the sale of the lot now owned by the defendant, the Charlotte Construction Company conveyed other property in the same neighborhood in such manner as to permit the erection of apartment-houses thereon, for which reason, or for some reason unknown to the plaintiff, the defendant is now attempting to construct on the land owned by him "an apartment-house of several stories in height to be occupied by a great number of families."

5. The erection of such apartment-house, it is alleged, will result in irreparable injury to plaintiff's property; wherefore he asks that its construction be enjoined.

A demurrer was interposed by the defendant upon the ground that the complaint does not state facts sufficient to constitute a cause of action, either against the defendant, or in favor of the plaintiff.

From a judgment sustaining the demurrer the plaintiff appeals, assigning error.

B. S. Whiting for plaintiff.
Robert A. Wellons for defendant.

STACY, C. J., after stating the case: The appeal presents the single question as to whether a building restriction in a deed which provides that the lot of land thereby conveyed "shall be used for residential purposes only . . . and there shall not, at any one time, be more than one residence or dwelling-house on said lot (servants' houses excepted)," would be violated by erecting on said premises "an apartment-house of several stories in height to be occupied by a great number of families." We think not.

It was held in *Construction Co. v. Cobb,* 195 N. C., 690, 143 S. E., 522, that this covenant was not so restrictive as to prohibit the erection of an apartment-house, when used for residential purposes only, hence, upon authority of the *Cobb case,* the ruling of the trial court must be upheld.

Affirmed.

H. F. OWENS v. SOUTHERN RAILWAY COMPANY.

(Filed 28 November, 1928.)

Master and Servant—Liability of Master for Injuries to Servant—Safe Place to Work—Negligence—Proximate Cause—Anticipating Injury.

Evidence that the plaintiff, while engaged in his employment of unloading heavy railroad rails from a car, had his eye permanently injured by some particle flying therein immediately after the passage of one of the defendant's trains, and evidence that there was trash upon the ground at the place and that the rails had pieces of rust on them that would come off, is insufficient evidence of a causal connection between the negligence of the defendant in failing to furnish a suitable place in which to work, or of a result that could have been reasonably anticipated, and a motion as of nonsuit thereon should have been granted.

CIVIL ACTION, before *Townsend, Special Judge,* at February Term, 1928, of ROCKINGHAM.

Plaintiff alleged and offered evidence tending to show that on or about 14 August, 1926, he was assisting in the unloading of steel rails from a flat-car. Plaintiff was a section foreman, and had been working for the defendant about nineteen years. The steel rails were each about 66 feet long and weighed approximately 2,300 pounds. The rails were rolled from the flat-car to the ground. One rail had been unloaded, and when the second rail was unloaded plaintiff testified that a piece of "steel or something" struck him in the eye and inflicted permanent injury.

Plaintiff alleged as elements of negligence that he was not instructed how to unload the rails, and that no rail-loader was used for the purpose. He further alleged that the ground where the rails were unloaded was covered with trash and that the rails were rusty and had small scales on them, and that in unloading them in the manner specified some of these scales or small particles were knocked off. Plaintiff further alleged that after unloading the first rail a passenger train came by on another track, and that immediately after the passenger train passed the workmen proceeded to unload the second rail.

Issues of negligence, contributory negligence, assumption of risk, and damages were submitted to the jury and answered in favor of plaintiff, who was awarded a verdict of $2,500.

The judgment was as follows: "Upon the coming in of the verdict, the defendant moved to set aside the verdict and for a new trial for errors committed of record. The court is of the opinion that there was error in refusing to grant the motion of the defendant for judgment as of nonsuit, but in order that the whole matter may be carried up on one appeal, motion is denied and defendant excepts."

Thereupon judgment was signed upon the verdict, and the defendant appealed.

P. T. Stiers and F. Eugene Hester for plaintiff.
Brown & Trotter for defendant.

BROGDEN, J. The vital question in the case is whether or not the motion for nonsuit should have been granted.

While several elements of negligence were alleged, it does not appear from the proof offered that the injury to plaintiff proximately resulted from any of these elements, except that there was trash on the ground where the rails were unloaded, and that there were small scales of steel upon the rails which were worked off in the process of unloading. Therefore, the question of law standing at the threshold of the inquiry is whether or not the defendant could, in the exercise of ordinary care, anticipate or foresee that a particle of trash or steel would be blown into the plaintiff's eye. The rule of liability applicable to the facts presented is thus stated in *Carter v. Lumber Co.,* 129 N. C., 203, 39 S. E., 828: "It is right that one should be required to anticipate and guard against consequences that may be reasonably expected to occur; but it would be violative of every principle of law or justice if he should be compelled to foresee and provide against that which no reasonable man would expect to happen. The business affairs of life would come to a standstill if employers had to busy themselves for their own and their employee's safety in the study of ingenious devices to meet every case of possible damage and hurt. There would soon be neither capitalists nor laborers from the modern view. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely to be known in the course of things." *Bradley v. Coal Co.,* 169 N. C., 255, 85 S. E., 388; *Davis v. R. R.,* 170 N. C., 582, 87 S. E., 745.

There is a suggestion that the suction or vortex created by the passenger train might have blown the foreign substance into plaintiff's eye.

However, suction created by a moving train has not been recognized as an element of actionable negligence in this State under ordinary circumstances. *Davis v. R. R.,* 170 N. C., 582.

The evidence of plaintiff, viewed in its most favorable light, does not disclose how the trash or steel was blown into his eye. This fact rests only in conjecture, and conjecture or speculation is not evidence.

Upon this state of the record, we are forced to the conclusion that the evidence demonstrated no causal connection between the injury and the acts of negligence complained of; neither does it appear that the defendant in the exercise of ordinary care could have reasonably anticipated or foreseen that injury was likely to occur under the circumstances disclosed by the record.

Therefore, we agree with the trial judge that the cause should have been nonsuited.

Error.

LUCINDA P. MILLS v. F. B. KEMP, JR., ADMINISTRATOR OF THE ESTATE OF F. B. KEMP, TRUSTEE, AND J. P. WILSON, TRUSTEE.

(Filed 28 November, 1928.)

1. Mortgages—Cancellation—Form and Validity of Cancellation.

The statute in regard to the cancellation of mortgages and deeds of trust by cancellation entry upon the record must be strictly complied with in order to secure the grantee in a subsequent conveyance of the *locus in quo* against the prior encumbrance, and where this is done upon exhibit of the canceled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. C. S., 2594.

2. Same—Rights of Subsequent Mortgagee—Notice.

Where an entry of cancellation is made of record by the register of deeds in canceling a mortgage, C. S., 2594, reciting another name as mortgagee, trustee or *cestui que trust* than that appearing in the registration of the instrument, and that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds had made a mistake in canceling the mortgage, and fix him with notice of all facts a reasonable inquiry would have revealed.

APPEAL by defendant from *Clement, J.,* 19 September, 1928. From ROCKINGHAM. Reversed.

This is an injunction proceeding. J. W. Norman, who is now insolvent, then the owner, contracted on 5 October, 1920, to convey to plaintiff, Lucinda P. Mills, two lots of land, describing same. The plaintiff paid the purchase price, the final balance was paid prior to 9 September, 1926, except $400, for the lots totaling $3,677.40, and J. W. Norman and wife executed and delivered to her a warranty deed to the lots, which was recorded in the office of the register of deeds of Rockingham County, N. C., on 24 January, 1927, Book 234, p. 444. Prior to plaintiff's contract of 5 October, 1920, with J. W. Norman, he had executed a deed of trust on 13 August, 1920, on the same lots to F. B. Kemp, trustee for J. P. Wilson, trustee, a deed of trust for the sum of $4,377.12, to secure four notes of $1,094.28 each, payable one, two, three and four years after date to J. P. Wilson, trustee, which deed of trust was duly recorded in the office of the register of deeds for said county on 7 September, 1920, in Book 210, p. 115. Plaintiff, after recording her deed, about 12 September, 1927, borrowed $580 from the Boulevard Building and Loan Association on the lots after an examination of the title by its attorney and after the alleged cancellation hereafter set forth, which he found appearing on record. The Building and Loan Association's attorney relied on the cancellation in making the loan.

The further facts found by the court below are as follows:

"On 9 September, 1926, the following entry of cancellation was made by the register of deeds of Rockingham County upon the margin of the record, to wit: Book 210, page 113, in the office of the register of deeds of Rockingham County, whereon the said deed of trust from J. W. Norman to F. B. Kemp, trustee, was recorded.

"The original of the annexed deed of trust accompanied by the bond and payment and satisfaction endorsed thereon by Cicero Powell, the beneficiary of same, having been exhibited to me, I hereby cancel the same by marking 'Satisfaction, according to law. This 9 September, 1926. W. S. Chambers, R. D.'

"That neither the trustee, F. B. Kemp, nor F. B. Kemp, Jr., administrator of J. P. Wilson, trustee, or any other person holding the notes secured by said deed of trust, authorized or directed the entry of cancellation as herein set out, but that prior to the time of the registration of plaintiff's deed, the said entry and cancellation was made by the register of deeds of Rockingham County, through error, mistake or inadvertence. . . .

"J. P. Wilson, trustee, to whom the said notes were executed by J. W. Norman, on 13 August, 1920, and which said notes were secured by deed of trust executed to F. B. Kemp, trustee, holds said notes and deed of trust, and has held same since their execution; that they have never been marked canceled or presented to the register of deeds for cancellation; that the name Cicero Powell as set forth in the purported cancellation as beneficiary was never the beneficiary and has never had any interest in the notes and deed of trust set forth in the record; that said J. P.

Wilson, trustee, and F. B. Kemp, trustee, have been guilty of no neglect and were in nowise responsible for the purported cancellation; that the cancellation made by the register of deeds was intended by him to be a cancellation of a different record on a different page of the book; that there is a balance due on said notes and deed of trust in the sum of $3,216.30, which amount represents a part of the purchase price which said J. W. Norman contracted to pay for said land."

The court below rendered the following judgment:

"From the foregoing facts the court is of the opinion that the cancellation made by the register of deeds is a valid cancellation; that the deed of trust executed to F. B. Kemp, trustee, for J. P. Wilson, trustee, has been legally discharged so far as the plaintiff is concerned.

"It is therefore considered, ordered and adjudged that the cancellation appearing of record be, and is hereby declared to be a valid cancellation and discharge of the lien and encumbrance in favor of J. P. Wilson, trustee, so far as the lands of the plaintiff are concerned, to wit, lots numbers 2 and 3, as described in the complaint; that the restraining order heretofore granted be, and is hereby made permanent."

From the judgment defendants excepted, assigned error and appealed to the Supreme Court.

H. L. Fagg, Hunter K. Penn and A. H. King for plaintiff.
Glidewell, Dunn & Gwyn for defendants.

CLARKSON, J. (1) Do the certain words appearing upon the margin of the record constitute a valid cancellation under the statute? We think not. (2) Were the words sufficient to put a prudent man on inquiry? We think so.

C. S., 2594: "Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner: (2) *Upon the exhibition* of any mortgage, deed of trust or other instrument intended to secure the payment of money, *accompanied with the bond or note,* to the register of deeds or his deputy, where the same is registered, *with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same;* or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of 'satisfaction' on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: *Provided,* that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled. (3) Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not. (4) *Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed,* shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded."

The intent of the statute seems to be that to operate as a release or reconveyance, the express requirements of the statute must be complied with. This has not been done.

In *Bank v. Sauls,* 183 N. C., at p. 169, it is said: "The second section of C. S., 2594, requiring cancellation, expressly provides that if not canceled by the mortgagee or trustee, that the mortgage or deed of trust, with the note secured, may be produced, and, if marked satisfied, the register of deeds shall mark the instrument canceled. Neither notes nor mortgages are required to be produced when the mortgagee in person makes or authorizes the cancellation. It would seem that this defect in the statute might be remedied by legislation so as to require that the notes and mortgage shall be produced when the mortgagee enters the cancellation, but that is a matter for the legislative department. The statute is plain, and in the absence of fraud participated in by the creditor or purchaser, if the statute is followed the creditor is protected by the entry and cancellation of the mortgage which, if made in the manner provided in the statute, is conclusive."

The cancellation was not made in the manner provided by the statute.

Let us see; the attempted cancellation was as follows: *"The original of the annexed deed of trust, accompanied with the bond and payment and satisfaction endorsed thereon by Cicero Powell, the beneficiary of same, having been exhibited to me, I hereby cancel the same by marking 'Satisfaction, according to law.' This 9 September, 1926. W. S. Chambers, R. D."*

J. W. Norman made the deed of trust to F. B. Kemp, trustee, for *J. P. Wilson, trustee.* So far as the record discloses, *Cicero Powell* was not the payee, mortgagee, trustee or assignee of the same. "Endorsed thereon by Cicero Powell, the beneficiary of same," is insufficient. He admittedly is neither "payee, mortgagee, trustee, or assignee of the same," and the cancellation does not comply with the statute. A beneficiary is defined in 1 Story Eq. Jur., sec. 321: "One for whose benefit a trust is created—a *cestui que trust.*" J. P. Wilson, trustee, was the *cestui que trust,* not Cicero Powell.

In *Insurance Co. v. Cates,* 193 N. C., p. 456, the cancellation was a forgery by the act of a third person. This was held absolutely void. The Court, at p. 462-3 said: "In *Heyder v. Excelsior B. and L. Association,* 42 N. J. Eq., 403, 8 Atl., 310, 59 Am. Rep., 49, it is very justly said: 'The security afforded by registry should remain undisturbed by cancellation effected through mistake, accident, or fraud of third persons, even if by such cancellation subsequent mortgagees or purchasers are made to suffer loss. Such after-acquired rights ought not to prevail against the just claims of an innocent, nonnegligent encumbrancer, because the record has been wrongly effaced.' "

In *Swindell v. Stephens,* 193 N. C., at p. 477, it is held: "It is further agreed that the cancellation of the deed of trust from Cuthrell to Vaughn, trustee, was entered on the record by the register of deeds, who was authorized by statute to cancel the deed of trust upon the exhibition to him of the deed of trust, with the notes secured thereby, endorsed by the trustee, in the deed of trust, or by the payee of the notes secured thereby, 'Paid and satisfied.' This cancellation, as same appears upon the record, is regular in all respects; it is a discharge of the land from the lien of the deed of trust, certainly in so far as the North Carolina Joint Stock Land Bank is concerned. *Guano Co. v. Walston,* 187 N. C., 667."

In the before-mentioned and like cases, where the statute was strictly complied with by the proper officer, a subsequent creditor or purchaser had a right to rely on the cancellation and was protected.

As to the second proposition: The recorded deed of trust was made to secure a certain sum, $4,377.12, together *with four notes* of $1,094.28, payable one, two, three and four years. Examining the alleged cancellation, it says "annexed deed of trust accompanied with the bond." Yet there were four bonds or notes, giving the word notes a broad terminology. Sufficient notice was disclosed by the alleged cancellation to put a prudent examiner on inquiry. Upon inquiry it would have been found that the cancellation was a mistake, "with the bond," does not mean four notes or bonds.

It is said in *Whitehurst v. Garrett, ante,* at p. 157: "In this jurisdiction, under C. S., 3311, the registration of deeds of trust and mortgages on real and personal property have been held of prime importance. . . . It gives stability to business. When properly probated and registered, they are constructive notice to all the world. Creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, obtain no title as against a properly probated and registered conveyance, sufficiently describing the property." When properly canceled the same principle applies.

In regard to the duty of a prudent man to make inquiry, it is said in *R. R. v. Comrs.,* 188 N. C., at p. 267: "Such notice was sufficient, at least, to put the plaintiff upon inquiry, and this carries with it a presumption of notice of everything which a reasonable investigation would have disclosed. *Blackwood v. Jones,* 57 N. C., 54; *May v. Hanks,* 62 N. C., 310. A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interest. *Wynn v. Grant,* 166 N. C., p. 45." *Ijames v. Gaither,* 93 N. C., at p. 362; *Farmers, etc., Bank v. Germania Life Ins. Co.,* 150 N. C., 770; *Lumber Co. v. Trading Co.,* 163 N. C., 314. For the reasons given, the judgment below is

Reversed.

J. ED STEVENS v. J. T. ROSTAN, SILVIO MARTINETTE AND EARL B. SEARCY, TRADING AND DOING BUSINESS AS THE WALDENSIAN BAKERY COMPANY.

(Filed 28 November, 1928.)

1. Highways—Regulation and Use for Travel—Law of the Road—Automobiles—Negligence—Nonsuit.

Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the embankment on the right of the road, resulting in the injury in suit: *Held,* the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. C. S., 2617.

2. Trial—Taking Question or Case from Jury—Nonsuit.

Where the plaintiff's evidence is conflicting in some respects its credibility is for the jury; and *Held*, under the facts of this case, the evidence viewed in the light most favorable to the plaintiff was sufficient on the question of defendant's actionable negligence to be submitted to the jury.

APPEAL by plaintiff from *Finley, J.*, at June Term, 1928, of BURKE. Reversed.

This is an action for actionable negligence. The plaintiff testified that on 26 August, 1926, he was driving a Maxwell touring car; with him in the car were Mrs. W. R. Absher and her daughter. Going east from Asheville, N. C., on Highway No. 10, between 5 and 6 o'clock in the evening, when approaching the village of Glen Alpine, he noticed a truck in front of him. It was being driven in the center of the highway. He drove up and slowed down behind the truck and blew his horn. "He (the driver of the bread truck) began to pull over to the left of the road and continued pulling over to the left until he was almost in front of the garage there, and he almost came to a stop. I don't know that he did stop, but he was very slow, and he turned across to the right very suddenly right in front of me. When he pulled towards the left, his car went off of the pavement. I was still on the pavement on the right-hand side. There was nothing to obstruct my line of vision down the right-hand side of the highway. It was a straight line and no cars were coming. There was nothing in my right of way on my right-hand side when he drew his truck in front of me. I slowed up until he went off of the highway and then I speeded up. I had my car under control, and when the truck went across the road I threw my car suddenly to the right to keep from going head on. He gave no signal that I saw or heard. The truck is about 17 feet long, I imagine, or more, and it was about two feet, as well as I remember, off the pavement on the right-hand side; the front wheel of the truck was about two feet off the pavement on the right-hand side. It was that way after the wreck, when the truck stopped. It extended back across the highway about five feet. When the truck came in front of me, I suddenly turned to the right to keep from going head on into the truck. Then I ran off and turned over a wall. . . . When he threw his car across the road in front of me, of course it was just like that (quick movement), and I was right on him, and I threw my car to the right very suddenly. It was the only thing I could do or hit him. When his truck was in that position, I could not turn to the left to pass him because I was almost on him. . . . (Cross-examination) I will swear now that I don't know whether I did nor did not blow my horn to signal that I desired to pass. . . . There was a wide place on the north side of the highway in front of the garage, on the left-hand side a good sized space. There was not plenty of room to have passed on the left. There was abundant room north of the highway to have passed—about 90 feet. . . . I was aware of the fact that under the law it was my duty to notify the driver of that truck of the fact that a car was in the rear and desired to pass and afford him an opportunity of moving to the right of the center of that highway before I undertook to pass, and I did notify him. I thought he was going to park there. I thought that, although his car was still in motion, and there was nothing on the right-hand side for him to turn into except that vacant lot. I saw the filling station on the south side of the highway and did not know but what he was going to enter it. I knew that under the rules regulating traffic on the highway that it was my duty to slacken the speed of my car and, if necessary, to stop it and delay my effort to pass until he had gone to the right of the center of the highway and afforded room to pass on the left of the truck, and that it was a violation of the law and indictable if you passed or attempted to pass on the right of the truck. He had surrendered the right of way and left it to me; had left the highway to a certain extent. The two wheels were off, but I can't say whether he had stopped the truck or not. I will not tell the court and the jury that I did not pay enough attention to it to tell them whether the truck had stopped or was in motion. I just say that I don't know. . . . This sounding of the horn that I spoke of was some distance from the garage, about 150 or maybe 200 feet west of the garage, I should think. I could not have passed the truck on the left. There would have been no accident if I had delayed my effort to pass until the highway was clear on the left of the truck, and I could have delayed it. So far as I know, the driver of that truck did not know that I was in the rear. He did not give any signal to let me know that he knew I was back there." (Redirect examination.) "He did not give me any signal that he was turning in. I did not know that he was parking there. Q. You were asked a while ago if you had stopped and waited for that truck to turn across and go in there would there have been no accident. If he had stopped where you signalled him, would there have been any accident? A. There would have been no accident. . . . It was so sudden the way the truck came across in front of me that I did not have time to think of anything."

Mrs. W. R. Absher testified in part: "I did not notice the bread wagon until it started to pull across the highway, but I noticed it when it started pulling directly across the highway over to the left. At that time Mr. Stevens was driving about 15 or 20 miles an hour. He did blow his horn. The driver of the truck was pulling directly across, and when Mr. Stevens blew his horn—he blew it more than once—but after he had blown his horn the driver of the truck looked out like that (illustrating) and saw us, because I saw his face distinctly; then he pulled right on across the highway to the left. There was just a lot on the left-hand side of the highway as far as I know. He had already seen us coming, because I saw his face. The truck pulled across the highway, and when it pulled across the highway the way was clear in front. The next thing I knew about the truck it was suddenly in front of us, and we either had to hit it or . . . It was going across the last time, coming back to the right. It had already crossed to the left and was coming back across the highway. Mr. Stevens' car could not have been more than five feet from the truck when it came across the road. Mr. Stevens turned his car suddenly to keep from hitting the truck, abruptly to the right. Pardon me; I am trying to tell it just as I saw it. The car came back so close and so suddenly that he could not do anything but hit him or go off."

Mrs. G. P. Sherrill testified in part as follows: "I was sitting east of the depot, and there was not a thing to obstruct my vision down to the garage there. I saw his car and then the truck coming down the highway, coming from the direction west going in the direction east, and I saw this Valdentian Bakery truck. It suddenly pulled to the left-hand side of the highway, and this car was coming on the right-hand side; and as the truck pulled to the left-hand side of the highway, it turned directly in front of this car, and the car run off of the embankment at the garage at Glen Alpine. . . . It seems to me that the truck looked like it pulled all the way off the highway, and it suddenly turned directly across the highway in front of this car. The Stevens' car at that time was on the highway on the right-hand side and it pulled right in front of this car. It did not come back to the left. . . . As far as I remember, and as far as I could see, Stevens' car had not left the highway at all until the truck came suddenly in front of him. . . . I said it seemed to me that it got all the way off the road—off of the hard surface and then turned suddenly across in front of this car on the highway."

At the close of the plaintiff's evidence, defendants moved for judgment as in case of nonsuit. C. S., 567. Motion allowed. Plaintiff excepted, assigned error and appealed to the Supreme Court.

J. Scroop Styles for plaintiff.
S. J. Ervin and S. J. Ervin, Jr., for defendants.

CLARKSON, J. C. S., 2617, in part, is as follows: "Whenever a person operating a motor vehicle shall meet on the public highway any other person riding or driving a horse or horses or other draft animals, or any other vehicle, the person so operating such motor vehicle and the person so riding or driving a horse, horses, or other draft animals, shall reasonably turn the same to the right of the center of such highway so as to pass without interference. Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal, or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left."

Plaintiff's testimony is conflicting in some respects, but the credibility is for the jury. *Shell v. Roseman,* 155 N. C., at p. 94; *Shaw v. Handle Co.,* 188 N. C., at p. 236. We think under the plaintiff's evidence, in the light most favorable to him, the issues of negligence, contributory negligence and damages, should have been submitted to the jury. *Dreher v. Devine,* 192 N. C., 325, is not controlling under the facts in the present case.

As to proximate cause, see *DeLaney v. Henderson,* 192 N. C., at p. 651; *Radford v. Young,* 194 N. C., 747. As to sudden danger or emergency, see *Riggs v. Mfg. Co.,* 190 N. C., at p. 260; *Fowler v. Underwood,* 193 N. C., 402; *Odom v. R. R.,* 193 N. C., 442.

Plaintiff's cause of action arose prior to Motor Vehicle Uniform Act, Public Laws of N. C., 1927, ch. 148, where the "Rules of the Road" are set forth. See, also, the North Carolina Code of 1927 (Michie), sec. 2621(44) *et seq.* For the reasons given, the nonsuit is

Reversed.

E. F. McKINNEY v. S. J. SUTPHIN, MRS. S. J. SUTPHIN AND U. G. BELTON, INTERPLEADER.

(Filed 28 November, 1928.)

1. **Mortgages—Foreclosure by Action—Disposition of Surplus.**

The mortgagor of lands before foreclosure may sell and convey by deed his right of equity of redemption to another upon agreement that the purchaser assume the payment of the mortgage lien, and thereafter when the lands are foreclosed the purchaser is entitled to the surplus remaining as against his vendor.

2. **Same—Purchaser of the Equity of Redemption.**

Where the mortgagor has conveyed his equity of redemption, upon a later foreclosure, the surplus does not belong to the mortgagor, but to the grantee in the deed conveying his equity of redemption, the surplus representing the value of the equity conveyed, and where the purchaser of the equity alleges these facts, the mortgagor's demurrer to his plea is bad.

3. Evidence—Burden of Proof—Interveners.

The intervener in an action becomes the actor therein and has the burden of establishing his rights set up by him.

Appeal by U. G. Belton, intervener, from *McRae, Special Judge,* at March Term, 1928, of Surry. Reversed.

This was an action brought on 18 April, 1925, by E. F. McKinney against Mr. and Mrs. S. J. Sutphin. The plaintiff contended that the defendants were indebted to him on account of usurious interest charged and paid, $360, and the penalty under the statute, totaling $720. The cause of action grew out of a loan of $1,000 made by Mrs. S. J. Sutphin to E. F. McKinney. The note representing the loan was secured by deed of trust from E. F. McKinney and wife to T. G. Fawcett, trustee for Mrs. S. J. Sutphin, on certain real estate. The deed of trust was foreclosed and plaintiff attached the surplus fund of $240 balance after paying the note before mentioned and interest, to pay the alleged usurious $360 interest and penalty.

U. G. Belton filed interplea as hereinafter set forth. After first having filed a written reply to the interplea, the plaintiff, E. F. McKinney, entered a demurrer *ore tenus* to the interplea, which demurrer the court sustained and entered judgment. From this judgment the intervener, U. G. Belton, having excepted to the court's ruling and judgment sustaining plaintiff's demurrer, excepted, assigned error and appealed to the Supreme Court.

Other material facts will be set forth in the opinion.

The plea of the intervener, U. G. Belton, is as follows:

"U. G. Belton comes into court and files the following interplea, and says:

"1. That on or about 1 February, 1925, E. F. McKinney (it is admitted his wife joined in the deed) conveyed to the plaintiff (U. G. Belton, intervener) the lands described in the pleadings in this cause, to wit, that certain lot or parcel of land situated in the town of Mount Airy on the north side of Franklin Street and described in deed of trust executed to E. F. McKinney and wife to T. G. Fawcett, trustee for Mrs. S. J. Sutphin (erroneously named Mrs. J. S. Sutphin).

"2. That in the conveyance made and by agreement between the said E. F. McKinney and interpleader, U. G. Belton assumed the payment of the actual amount due on deed of trust executed by the said E. F. McKinney and wife to T. G. Fawcett, trustee for S. J. Sutphin, and Mrs. S. J. Sutphin, which, as interpleader is informed and believes, and as was represented to him, was one thousand dollars with interest from 1 February, 1925.

"3. That interpleader tendered to T. G. Fawcett, trustee, and president of the First National Bank, one thousand dollars and interest from

1 February, 1925, and demanded the surrender of the said deed of trust, but pursuant to the direction of the said S. J. Sutphin and Mrs. S. J. Sutphin, the said T. G. Fawcett, trustee and president of the bank aforesaid, acting for the said S. J. Sutphin and Mrs. S. J. Sutphin, declined to accept the one thousand dollars with interest, but demanded $1,147 or thereabout, and refusing to accept the tender made and which amount was the amount assumed by interpleader. The trustee, at the direction of S. J. Sutphin and Mrs. S. J. Sutphin advertised the aforesaid lands mentioned in said deed of trust and sold the same, when and where J. H. Folger became the last and highest bidder at the sum of twelve hundred and sixty dollars ($1,260), and that the said J. H. Folger transferred his right to U. G. Belton; that there is now in the hands of the trustee two hundred and forty dollars ($240) to which this interpleader alleges he is entitled, having tendered and then paid the amount actually due on the deed of trust; and that this interpleader is entitled to the said moneys, he having obtained through the conveyance made by E. F. McKinney and wife to interpleader the equity of redemption and right of redemption, and the right to all the moneys over and above the amount with interest from 1 February, 1925, and that said two hundred forty dollars is the property of the interpleader."

W. F. Carter for plaintiff.
Folger & Folger for U. G. Belton.

Clarkson, J. The sole question involved in this appeal: Does the intervener, U. G. Belton, allege facts sufficient to entitle him to the surplus in the hands of the trustee? We think so.

The intervener's plea sets forth: (1) On or about 1 February, 1925, E. F. McKinney and wife conveyed to U. G. Belton a certain tract of land, describing it. (2) That in the conveyance made and by agreement between E. F. McKinney and U. G. Belton, the said Belton assumed the payment of $1,000 and interest from 1 February, 1925, the actual amount due on a deed of trust on the same land made by E. F. McKinney and wife to T. G. Fawcett, trustee, for Mr. and Mrs. S. J. Sutphin. (3) U. G. Belton tendered payment of the $1,000, and interest from 1 February, 1925, which the trustee and the Sutphins declined to accept. (4) Under the direction of the Sutphins, the trustee sold the land and it brought $1,260. (5) There is now in the hands of the trustee $240 balance over and above the $1,000 and interest paid on the note, which U. G. Belton claims he is entitled to, as he purchased from E. F. McKinney the equity of redemption and right of redemption.

The plaintiff, E. F. McKinney, claims certain amounts far in excess of the $240 due for usurious interest charged and paid by him to the Sutphins and sues them for it and the penalty under C. S., 2306, and attached the $240, the surplus over and above the note of $1,000 and interest secured by deed of trust made by the said McKinney to secure the Sutphins, now in the hands of the trustee. The deed from E. F. McKinney to the intervener, U. G. Belton, was made on or about 1 February, 1925, and the action for the fund in controversy was instituted 18 April, 1925. The intervener's plea was filed in the action 13 June, 1925.

19 R. C. L. (Mortgages), p. 367, sec. 136, in part is as follows: "It is axiomatic that a mortgagor, until he has been divested of his interest in the property mortgaged by foreclosure and sale, generally has a substantial estate in the property, whether it be termed a right of redemption, an equity of redemption, or a full legal title, which he can dispose of subject to the mortgage."

The intervener had a right to file his plea in the action under C. S., 829-840; 2 R. C. L., 881. As to his other remedies, see *Flowers v. Spears,* 190 N. C., 747.

The intervener becomes the actor and the burden of the issue is on the intervener. *Sitterson v. Speller,* 190 N. C., 192; *Lockhart v. Ins. Co.,* 193 N. C., 8; *Sugg v. Engine Co.,* 193 N. C., 814. When E. F. McKinney and wife deeded the land to U. G. Belton, and in the conveyance made and by agreement Belton assumed the $1,000 note and interest from 1 February, 1925, Belton became the principal debtor for the amount assumed. *Parlier v. Miller,* 186 N. C., 501. Out of the sale of the land the debt was paid and the surplus belonged to Belton, who owned the equity of redemption. McKinney, by his deed of the equity of redemption and agreement, is estopped to claim the surplus.

McKinney's action for usury and the penalty was one against the Sutphins. He could not attach the fund under his conveyance and agreement, as the surplus over the lien debt belonged to Belton. McKinney deeded his equity of redemption in the land to Belton, and the surplus was the equity in the land, and, under the deed, belonged to Belton. See *Erwin v. Morris,* 137 N. C., p. 48; *Elliott v. Brady,* 172 N. C., p. 828.

In *Waters v. Garris,* 188 N. C., at p. 309-10, it is said: "From an examination of the above section (C. S., 2306), it will be seen that two remedies are provided for the enforcement of the penalties authorized by the statute: 1. Where a greater rate of interest than six per centum per annum has been paid, the person or his legal representatives or the corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action at law in the nature of an action for debt. *Bank v. Wysong,* 177 N. C., 390. 2. In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set-off the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged. But see *Miller v. Dunn, post* (188), p. 397." *Ripple v. Mortgage Corp.,* 193 N. C., 422; *Pratt v. Mortgage Co., ante,* 294.

The plaintiff demurred *ore tenus* to the plea of the intervener Belton. It is well settled that the demurrer of plaintiff admits all the material allegations of the plea of the intervener. The judgment of the court below sustaining the demurrer is

Reversed.

MARION HINES, ADMINISTRATOR OF JAMES HINES, DECEASED, v. THE FOUNDATION COMPANY OF NEW YORK.

(Filed 28 November, 1928.)

1. **Executors and Administrators — Distribution of Estate — Assets not Available to Creditors—Wrongful Death.**

   Damages for a wrongful death are not assets of the estate available to creditors, and are to be disposed of according to the canons of descent and distribution. C. S., 160, 161.

2. **Executors and Administrators—Appointment, Qualification and Tenure —Appointment of Two Administrators for Same Estate by Different Courts—"Full Faith and Credit."**

   Where, in an action to recover for wrongful death, it appears that an administrator has been appointed under the laws of South Carolina after full notice to all of the distributees and heirs at law of the deceased, and that the administrator so appointed has made a compromise and settlement, and thereafter, upon allegation that the deceased was a resident of this State, an administrator had been appointed here: *Held,* under the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, the compromise effected by the administrator duly appointed under the laws of South Carolina will operate as an estoppel in an action brought here by the administrator appointed in North Carolina, in the absence of allegations of fraud, unfairness or injustice.

3. **Same—Application for Letters Determines Priority.**

   Upon the question of whether an administrator has been first appointed in the jurisdiction of our court or in that of another State is determined by the time of the application of letters testamentary, whether first in this State or in the other State.

4. Same—Appointment not Subject to Collateral Attack.

The appointment of an administrator by a court of competent jurisdiction, where the death of the intestate is admitted, and fraud is not alleged, is not subject to collateral attack, but the validity of the appointment can be questioned only by a direct proceeding.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1928, of DURHAM. No error.

Action to recover damages for wrongful death of plaintiff's intestate.

James Hines died in Greensboro, N. C., on 23 July, 1926. Plaintiff was appointed as his administrator by the clerk of the Superior Court of Durham County, North Carolina, on 17 August, 1926. Summons in this action was issued on 17 August and served on defendant on 18 August, 1926. In the complaint filed on 17 August, 1926, plaintiff alleged that the death of his intestate was caused by the negligence of defendant; he prayed judgment that he recover of defendant, as damages resulting from the death of his intestate, the sum of $10,000. His cause of action is founded upon a statute of this State. C. S., 160.

At the trial in the Superior Court the jury found that the death of James Hines, plaintiff's intestate, was caused by the negligence of defendant, as alleged in the complaint.

In bar of plaintiff's recovery of damages, as prayed for in his complaint, defendant relied upon a settlement of the claims of the next of kin of the deceased made by defendant with the administratrix of James Hines, deceased, appointed by the Probate Court of Florence County, South Carolina, on 20 August, 1926, pursuant to an application for such appointment made on 31 July, 1926, and upon a release executed on 20 August, 1926, by said administratrix.

The jury found that the release is valid, and that the claims of the next of kin of deceased against defendant, on account of his death, had been settled and paid.

From judgment on the verdict, denying plaintiff a recovery of damages in this action, plaintiff appealed to the Supreme Court.

R. O. Everett and V. S. Bryant for plaintiff.
Fuller, Reade & Fuller for defendant.

CONNOR, J. James Hines died in the city of Greensboro, in this State, on 23 July, 1926. His death was caused by the negligence of defendant, a corporation organized and doing business under the laws of the State of New York. Deceased at the date of his death was employed by defendant as a laborer, at Greensboro, N. C., where defendant was engaged in the construction of a hotel. Defendant is liable for such damages as are a fair and just compensation for the pecuniary injury resulting from the death of the deceased, to be recovered by his administrator, in an action brought within one year after his death. The amount recovered in such action is not liable to be applied as assets in the payment of the debts of deceased, but must be disposed of in accordance with the provisions of the Statute of Distribution of this State. C. S., 160, and C. S., 161.

On 31 July, 1926, Louvenia Hines, widow of James Hines, applied to the Probate Court of Florence County, South Carolina, for letters of administration upon the estate of the decedent. In her application for such letters, which was in writing, the said Louvenia Hines represented to said court that James Hines was dead; that at the date of his death, and prior thereto, he was a resident of Florence County, South Carolina; that his next of kin and heirs at law were Louvenia Hines, his widow, and Precious Hines, his daughter; that there were no assets belonging to the estate of the decedent, except a claim for unliquidated damages against the Foundation Company, the defendant in this action. A citation was made by said court, addressed to all and singular the kindred and creditors of James Hines, deceased, admonishing them to appear before the judge of said court on 16 August, 1926, to show cause, if any they had, why the application of the said Louvenia Hines should not be granted. Thereafter, on 20 August, 1926, an order was entered by said court appointing the said Louvenia Hines administratrix of James Hines, deceased, and directing that letters of administration upon his estate be issued to her. The said Louvenia Hines duly qualified as administratrix of James Hines, deceased, and thereafter upon the payment to her, as such administratrix, of the sum of $1,500, by defendant, she executed the release set up in defendant's answer as a bar to plaintiff's recovery in this action. This release is sufficient in form to discharge defendant from liability for any other or further sum as damages resulting from the death of James Hines. The sum of $1,500, paid by defendant to Louvenia Hines, administratrix of James Hines, has been disposed of in accordance with the provisions of the Statute of Distribution of South Carolina, which is identical with the statute of this State. One-third of said sum has been paid to the widow of deceased, and the remaining two-thirds to his only child, a daughter.

Plaintiff offered evidence tending to show that the deceased, James Hines, at the date of his death, at Greensboro, N. C., was a citizen of North Carolina, and a resident of Durham County in said State; that Louvenia Hines, who executed the release set up in defendant's answer, was a citizen of South Carolina; that she and her husband, James Hines, were living separate and apart from each other at the date of his death, and had so lived for about seven years; that during this time she had given birth to children of whom her husband, James Hines, was not the father; and that plaintiff, Marion Hines, a resident of Durham County, was a brother of the deceased. This evidence was offered by plaintiff in support of his attack upon the validity of the release executed by Louvenia Hines, as administratrix of James Hines, and relied upon by defendant as a bar to plaintiff's recovery of damages in this action. Whether or not the release is valid, and has the effect of discharging defendant from liability to plaintiff for damages, involves the primary question as to whether or not the appointment of Louvenia Hines as administratrix of James Hines, by the Probate Court of Florence County, South Carolina, is subject to collateral attack in this action.

It must be held that upon the facts appearing on the face of the record in the Probate Court of Florence County, South Carolina, the said court had jurisdiction to appoint an administrator of James Hines, deceased, and to issue letters of administration on his estate. The primary jurisdictional fact, to wit, the death of James Hines, is admitted. The remaining jurisdictional facts were found by the court, to wit, that deceased was domiciled at the date of his death within the territorial jurisdiction of the court, and that there were assets, requiring an administration of his estate, within said jurisdiction. The jurisdictional facts were found by the court, as appears upon the face of the record. Upon these facts the court decided that it had jurisdiction, and in the exercise of such jurisdiction it made the order, appointing an administrator, and directing that letters of administration issue to its appointee. This order is not subject to collateral attack; it is a valid order, and must stand, until it is attacked and set aside in a direct proceeding for that purpose.

The principle upon which this decision is made is stated and applied in *Holmes v. Wharton,* 194 N. C., 470, 140 S. E., 93; *Tyer v. Lumber Co.,* 188 N. C., 274, 124 S. E., 306; *Batchelor v. Overton,* 158 N. C., 396, 74 S. E., 20; *Fann v. R. R.,* 155 N. C., 136, 71 S. E., 81. The principle is well settled not only by decisions of this Court, but also by decisions of courts of other jurisdictions. 23 C. J., 1086. It is generally held that a grant of letters of administration which is not void, although it may be voidable, is not open to collateral attack; such attack can be sustained only upon the ground that upon the face of the record, the court granting the letters, and making the appointment, was without jurisdiction. The only exception to this rule is that it may be shown, collaterally, that the person for whom an administrator has been appointed, is not, in fact dead, but is still living.

The decisions of this Court in the above-cited cases were with respect to orders made in the exercise of their statutory jurisdiction by clerks of the Superior Court of this State. The order in the instant case, which plaintiff seeks to attack collaterally, was made by the Probate Court of Florence County, South Carolina. This attack is made in an action pending in the Superior Court of this State. This fact, however, does not affect the application of the principle, for under the provisions of section 1 of Article IV of the Constitution of the United States, "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

The principle that a collateral attack cannot be sustained upon an order appointing an administrator for a deceased person, applies not only where the appointment attacked was made by a court of this State, of competent jurisdiction, but also where the appointment was made by such court of another State. To hold otherwise would be a violation of a provision of the Constitution of the United States, which is controlling upon the courts of this State.

The order appointing plaintiff as administrator of James Hines, deceased, was made by the clerk of the Superior Court of Durham County, North Carolina, on 17 August, 1926; the order by the Probate Court of Florence County, South Carolina, appointing Louvenia Hines as administratrix of the said James Hines, was made on 20 August, 1926. However, the application for the latter order was made on 31 July, 1926. The Probate Court of Florence County acquired jurisdiction in the matter of the administration of the estate of James Hines, at the date of the application; hence, it cannot be held, as contended by plaintiff, that his appointment by the clerk of the Superior Court of Durham County was prior to the appointment of Louvenia Hines, by the Probate Court of Florence County for the purposes of determining the jurisdiction of the latter court.

After a careful consideration of the interesting questions presented by this appeal, we are of the opinion that there was no error upon the trial of this action in the Superior Court. Plaintiff did not allege that there was fraud or collusion in procuring the appointment of Louvenia Hines by the Probate Court of Florence County, South Carolina, as administratrix of James Hines; nor is there any allegation that the settlement made by her with defendant of the claims of his estate on account of his death against defendant, was unfair or unjust to the beneficiaries. The administratrix who made the settlement and who executed the release, is the widow of deceased, and as such has received her share of the amount paid by defendant; the only other person pecuniarily interested in the amount of damages for which defendant was liable, is the infant daughter of deceased, who is also the daughter of Louvenia Hines. Whether or not the settlement is binding upon her, is not presented in this action. The judgment must be affirmed. We find

No error.

METROPOLITAN REFINING COMPANY v. AVON MILLS COMPANY.

(Filed 28 November, 1928.)

Trial—Issues—Form and Sufficiency.

Issues submitted to the jury that give full opportunity to the parties to present every phase of the controversy will not be held for reversible error for refusing other issues tendered, when the court has properly instructed the jury thereunder.

APPEAL by defendant from *Townsend, J.*, at Fall Term, 1928, of GASTON. No error.

J. L. Hamme for plaintiff.
Mangum & Denney for defendant.

PER CURIAM. Plaintiff brought suit to recover the sum of $315 for an alleged sale to the defendant of a certain preparation to be used in cleaning, keeping clean, and removing rust from the defendant's boilers. The defendant denied liability and pleaded fraud practiced by the plaintiff in securing the execution of the alleged contract. In answer to the issue submitted the jury found that the defendant is indebted to the plaintiff in the sum of $281.25 with interest from 1 March, 1927. The defendant tendered several issues relating to the controversy but, in our opinion, all the matters which the defendant intended to present could be considered under the issue submitted by the court and answered by the jury; and in such event the refusal of the court to submit the issues tendered is not held for reversible error. We have examined the instructions given the jury, and upon consideration of the pleadings and the evidence, we find no error which entitles the defendant to a new trial.

No error.

AMERICAN TRUST COMPANY, A CORPORATION, AS RECEIVER OF CHARLOTTE BANK AND TRUST COMPANY, v. CHARLES J. ANAGNOS.

(Filed 5 December, 1928.)

1. Bills and Notes—Requisites and Validity—Consideration—Presumptions.

Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and that the defendant in the bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration under the provisions of our statutes, C. S., 3004, 3005, and defendant must show failure of consideration when relied upon by him.

2. **Banks and Banking—Functions and Dealings—Officers and Agents.**

Where a president and director of a bank acts in his own interest in procuring from the defendant the note sued on by the bank, which is named payee therein, given for the accommodation of the officer alone, the knowledge of such officer will not be imputed to the bank.

3. **Same.**

Where a bank is made the payee of a note, and the evidence tends to show that it was given to the bank's president for his own accommodation in an exchange of notes, there is a reasonable inference that the exchange of notes was made to enable the president to make illegal use of the funds of the bank.

4. **Bills and Notes—Requisites and Validity—Consideration.**

In law a valuable consideration may consist in some right, interest or benefit accruing to one party, or in some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

APPEAL by plaintiff from *Harding, J.*, at May Special Term, 1928, of MECKLENBURG. New trial.

Plaintiff brought suit on two notes executed by defendant to the Charlotte Bank and Trust Company, one for $1,600 dated 7 November, 1926, and the other for $5,000 dated 3 December, 1926, payable 3 March, 1927. The defendant admitted his indebtedness on the former note for the full amount less a payment of $250. Judgment was rendered for the amount admitted to be due and the cause was retained for trial on the note for $5,000.

The defendant alleged that on 4 September, 1926, he executed a note to M. A. Turner, who was president of the Charlotte Bank and Trust Company, for $5,000 due 90 days after date; that Turner was a member of the loan committee; that the note was executed at Turner's request and for his accommodation in consideration of a similar note to be executed by Turner to the defendant, both notes having the same date and maturing at the same time; that when the first note became due Turner requested another exchange of notes in renewal; that the defendant made the note in suit payable to the Charlotte Bank and Trust Company, and that the defendant received nothing of value in any way for said note, except the note of M. A. Turner. An issue was submitted to the jury, who found that the defendant was not indebted to the plaintiff. Judgment for defendant; exception and appeal by the plaintiff on error assigned.

T. C. Guthrie, Jr., for plaintiff.

R. T. Puhlman and Thaddeus A. Adams for defendant.

ADAMS, J. The plaintiff excepted to the following instructions: "The court charges that the defendant having admitted execution of this note, it will be your duty to answer this issue $5,000 with interest from 3 March, 1927, but if the defendant has satisfied you by the greater weight of the evidence that it was agreed by a representative of the bank that it should not be paid, that he should not be called upon to pay it, but that it was a matter of accommodation of the bank or if you shall find it to be true by the greater weight of the evidence that the note was without consideration, the court charges you defendant would not be liable, then you would answer that issue 'Nothing.'"

Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party for value—value being any consideration sufficient to support a simple contract. C. S., 3004, 3005. It will be noted that the jury was instructed in the alternative as to the agreement "by a representative of the bank" and the want of consideration: the issue should be answered "Nothing" if the agreement was made *or* if there was no consideration for the note. We have no knowledge that any particular finding was the basis of the verdict.

According to the testimony of the defendant, M. A. Turner, who was president of the Charlotte Bank and Trust Company, requested the defendant to give him a note for $5,000 as an accommodation to him, promising to execute to the defendant a note for the same amount. Notes were thus interchanged on 4 September, 1926, and at maturity they were returned to the respective makers. Turner then asked the defendant to execute another note for the same sum in place of the one Turner had returned. The defendant did so, but the Charlotte Bank and Trust Company, not Turner, was named as payee. Turner then gave his note to the defendant.

If the defendant's testimony be accepted, the transaction was intended as an accommodation not to the bank, but to Turner; and if Turner was acting only for his own interest the bank would not be bound by his agreement with the defendant. It is settled law that an officer of a bank cannot bind the bank by his acts in respect to matters in which he is personally interested, and that those who have business with him are deemed to know that he cannot use the funds of the bank for his own benefit. *Grady v. Bank,* 184 N. C., 158; *Bank v. West, ibid.,* 220; *Stansell v. Payne,* 189 N. C., 647; *Quarries Co. v. Bank,* 190 N. C., 277, 280. In *Bank v. Wells,* 187 N. C., 515, it is said: "Ordinarily a bank is presumed to have notice of matters which are known to its president, upon the theory that he will, in the line of his duty, communicate to the bank such information as he has, but the law recognizes the frailty of human nature, and where the president has a personal interest to serve or is acting in a transaction in his own behalf, the presumption does not obtain that he will communicate to the bank matters which are detrimental to him."

It is not unreasonable to presume that Turner made the Charlotte Bank and Trust Company payee in the defendant's note with the design of using the funds of the bank for his own benefit. If he did so and made use of the funds there is no presumption that he communicated to the bank his agreement with the defendant. On the contrary, under these circumstances, the bank would have parted with its money on the strength of the defendant's note, and the defendant, nothing else appearing, would be liable thereon. It may be true that the defendant received nothing in consideration of his note except the note of Turner. But the note he executed to the bank may have been supported by a valuable consideration though the defendant neither received nor expected to receive any benefit; it is sufficient if the bank was subjected to loss or inconvenience. In a legal sense a valuable consideration may consist in some right, interest or benefit accruing to one party, or in some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Brown v. Ray,* 32 N. C., 73; *Institute v. Mebane,* 165 N. C., 644; *Fawcett v. Fawcett,* 191 N. C., 679; *Fertilizer Co. v. Eason,* 194 N. C., 244.

The instruction complained of is subject to these criticisms: (1) an agreement between Turner and the defendant would not be binding on the bank if Turner was personally interested in getting the amount of the note from the bank for his own benefit—a phase of the case which the jury was not permitted to consider; (2) there is no sufficient evidence that the note in question was executed as a matter of accommodation to the bank; (3) the phrase "without consideration" should be more fully explained in view of the plaintiff's contention that Turner received the amount of the note from the bank and used it for his own benefit. For the error assigned there must be a

New trial.

WILL CRAVER v. FRANKLIN COTTON MILLS, INC.

(Filed 5 December, 1928.)

1. Master and Servant—Liability of Master for Injuries to Servant—Safe Place to Work—Nonsuit.

Where in an action to recover damages of an employer for its negligence in failing to provide an employee a safe place to work, the evidence tended only to show that the plaintiff was required to go up flights of steps at night in the performance of his duties as watchman in the defendant's cotton mill, and was injured by tripping over a piece of wire stretched across a step between two nails, with evidence tending to show that the wire was not used in any way in connection with the operation of the mill, and that it was not there at six o'clock of the evening before, with conflicting evidence as to the sufficiency of an electric light burning near by, but that the plaintiff had gone up and down these steps many times with the same amount of light without injury, and without complaining during his several months employment at the mill: *Held*, the evidence was insufficient to take the issue of the defendant's actionable negligence to the jury.

2. **Negligence—Proximate Cause—Intervening Cause—Anticipating Injury.**

Upon evidence tending to show that independent acts or misconduct of another intervened and proximately caused the injury in suit, which the defendant in the exercise of ordinary care could not have reasonably anticipated, and defendant's motion as of nonsuit should be granted.

APPEAL by defendant from *Webb, J.*, at April Term, 1928, of CABARRUS. Reversed.

A. A. Tarlton, J. F. Newell and Hartsell & Hartsell for plaintiff.
W. H. Beckerdite, J. L. Crowell and J. L. Crowell, Jr., for defendant.

ADAMS, J. The plaintiff was employed by the defendant as a nightwatchman. It was his duty to keep watch on three floors of the mill, and once an hour in winding his clock to use keys which were "fastened to the upstairs and posts over the room." In the performance of this duty he had to go up and down a stairway. At 9 o'clock on the night of 7 September, 1927, while he was going from the second floor to the basement his foot was caught in the loop of a small wire each end of which had been fastened by nails to the eighth step, and he was thereby thrown to the foot of the stairway and injured. The defendant moved for nonsuit at the close of the plaintiff's testimony and at the conclusion of all the evidence, and excepted to the denial of its motion. The issues of negligence, contributory negligence, and damages, were answered in favor of the plaintiff, and from the judgment the defendant appealed upon assigned error.

The only negligence set forth in the original complaint has reference to the wire. It was alleged (1) that the defendant negligently operated its mill with a copper wire fastened on the eighth step of a stairway which it was necessary for the plaintiff to use in the course of his employment; (2) that the defendant negligently fastened the wire to the step; and (3) that the defendant knew, or by the exercise of due care should have known the wire was there. The complaint was subsequently amended by inserting an allegation of the defendant's negligent failure to light the stairway. It is upon these allegations that the action was prosecuted. It therefore becomes necessary to determine whether upon all the evidence either of the causes can be maintained.

First as to the lights: The plaintiff testified that one light was burning in the tower (which was more than ten feet square) when he was injured, but that it "did not shine on the staircase to do any good," and gave his reason for saying so; but he said that he had been engaged in this particular work for six months; that, excepting nine nights, he had gone up and down the stairway every hour while on duty, twelve times every night, when the light in the tower was burning, and that he had never fallen before. True, he testified that there was no light on the stairway when he was injured, and if one had been there he could have seen the wire; but the light in the tower was the only one which had been used during the preceding six months to light the stairway. Several witnesses testified in contradiction of the plaintiff as to the sufficiency of the light in the tower, which was very near the stairs; but considering the plaintiff's testimony as undenied, we cannot escape the conviction that the light in the tower was bright enough for the usual and ordinary prosecution of his work. The plaintiff seems to have thought so, for there is no evidence that he made any complaint to the defendant. Moreover, the testimony shows that the defendant had provided a lantern for the plaintiff and that he preferred a flash light. He testified, "Part of the time I carried a flash light and part of the time I didn't. I won't say whether I had one that night. Sometimes I'd go and forget to take it out of my pocket."

If sufficient provision was made in this respect for the usual work required of the plaintiff, how is the question of the defendant's negligence affected by the fact that a wire was nailed to the step? The wire was no part of the equipment of the mill; it was not needed or used in the operation of the machinery; it served no purpose in the defendant's business. It was about twenty-four inches long, the size of a knitting needle, insulated, and fastened to the step at each end by two nails eighteen inches apart. There is no evidence that the defendant put it there. Witnesses who had occasion to be on the stairway testified that the wire was not on the step at 3 o'clock, at 5:30, or at 6; and the plaintiff himself said, "Looks like if the wire had been there when I went down at 6 o'clock I might have seen it." We do not find any evidence that the defendant fastened the wire to the step or had any knowledge of it, actual or implied. It may have been put in position by some one moved by a prankish impulse or a malicious spirit; but under the evidence it cannot be imputed to the defendant.

Under these circumstances what duty did the defendant owe the plaintiff? Certainly not that of an insurer against injury. It owed the plaintiff the duty of exercising ordinary care to provide reasonably safe instrumentalities and a reasonably safe place in which to do his work, *i. e.,* the degree of care which a man of ordinary prudence would exercise, having due regard to his own safety. *Marks v. Cotton Mills,* 135 N. C., 290; *Nail v. Brown,* 150 N. C., 535; *Mercer v. R. R.,* 154 N. C., 401; *Gaither v. Clement,* 183 N. C., 450. We think the plaintiff's testimony shows that this requirement was met, if the wire be disregarded. We are also of opinion that in the absence of evidence connecting defendant with the act of nailing the wire to the step, it cannot be said that the defendant was negligent in failing to foresee and provide against the misconduct of others not reasonably to be anticipated and not supposed to happen save under rare and exceptional circumstances. Ordinarily, there is no duty to guard against danger unless one knows, or ought to know of its existence. Hale on Torts, 463; 29 Cyc., 433.

The defendant contends that this unforeseen act was the proximate cause of the injury. Accepting the familiar definition of proximate cause as that which in natural and continuous sequence, unbroken by any new and independent cause, produces an event, we must keep in mind the other principle that when an independent, efficient, and wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former and not the latter is deemed the proximate cause of the injury. While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence. This principle would apply if it should be granted that the defendant was negligent with respect to the light in the tower. *Harton v. Telephone Co.,* 141 N. C., 455; *Lineberry v. R. R.,* 187 N. C., 786; *Cobia v. R. R.,* 188 N. C., 490.

There being no sufficient evidence of the negligence on the part of the defendant, its motion to dismiss as in case of nonsuit should have been granted. Judgment

Reversed.

LUNDY B. HOLBROOK v. AMERICAN NATIONAL INSURANCE COMPANY.

(Filed 5 December, 1928.)

Insurance—Avoidance of Policy for Misrepresentations or Fraud—Matters Relating to Person Insured.

Under the provisions of C. S., 6460, as amended by chapter 13, Public Laws of 1927, and also with the amendment of chapter 82, Public Laws of 1925, a policy of life insurance where no medical examination of the applicant is required by the insurer under the statute, the policy to be void must be accompanied with fraudulent misrepresentations as to the health of the applicant, which must be shown by the company in resisting an action to recover upon the policy, and the fact that the insured was not in sound health at the time the policy was issued contrary to a provision in the policy is insufficient.

CIVIL ACTION, before *Lyon, J.*, at September Term, 1928, of FORSYTH.

The evidence tended to show that on 2 May, 1927, the defendant issued and delivered to Nora Lee Holbrook a life insurance policy in the sum of $500. Seven days thereafter, to wit, on 9 May, 1928, the insured died. The evidence further tended to show that the insured was not in sound health at the time the policy was delivered but was suffering with anæmia and tuberculosis. The policy was issued without medical examination and contained the following clause: "*Provided however,* that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

The cause was tried in the Forsyth County Court and the jury answered in the affirmative the following issue, among others: "Was the insured, at the date of the issuance of said policy, in unsound health, as alleged in the answer?" Judgment was rendered in the county court against the plaintiff and in favor of the defendant. Thereupon the plaintiff appealed to the Superior Court of Forsyth County. The trial judge in the Superior Court rendered the following judgment: "This cause coming on to be heard and being heard on appeal from the Forsyth County Court before Hon. C. C. Lyon, judge presiding, and it appearing to the court that an error was made in the court below in permitting defendant to resist payment of the policy of insurance in controversy for any reason except fraud; wherefore, it is ordered, adjudged and decreed that the cause be, and hereby is, remanded to the Forsyth County Court and a new trial ordered thereon."

From the judgment of the Superior Court the defendant appealed.

C. B. Poindexter and Z. C. Camp for plaintiff.
Fred M. Parrish for defendant.

BROGDEN, J. Does C. S., 6460, apply to a life insurance policy issued without medical examination for a sum less than $5,000?

C. S., 6460, as it first appeared in Consolidated Statutes, prohibited life insurance companies from issuing policies "in an amount equal to or exceeding $300" without medical examination. The section was amended by chapter 82, Public Laws of 1925, which increased the amount of policies issued without medical examination to a sum not exceeding $2,000. This act, however, added a proviso as follows: "*Provided,* that where there has been no medical examination the policy shall not be rendered void, nor shall payment be resisted on account of any misrepresentation as to the physical condition of applicant, except in cases of fraud." Subsequently the Legislature enacted chapter 13, Public Laws of 1927. This statute repealed all prior statutes and reënacted section 6460 as it now appears in Michie's Annotated Code of 1927. The present C. S., 6460, authorizes insurance companies to issue a life policy without medical examination up to $5,000, but the proviso is the same as contained in chapter 82, Public Laws of 1925. The movement of the law upon the subject clearly indicates that the General Assembly was disposed to permit insurance companies to increase the size of policies that could be written without medical examination, but at the same time, in order to protect the insured, it prescribed that if a policy was issued without medical examination the insurance company could not resist payment of the policy on the ground of physical unsoundness at the time of issuance, "except in cases of fraud." That is to say, if an insurance company issued a policy to a person it knew to be physically unsound, or took a chance upon a physical unsoundness and without medical examination, then in such event it could not take advantage of its own act in issuing such policy to one physically unsound "except in cases of fraud."

The defendant relies upon the following cases: *American National Ins. Co. v. Crystal,* 272 S. W., 262; *Seabach v. Metropolitan Life,* 274 Ill., 516; *Southern Surety Co. v. Benton,* 280 S. W., 551. An examination of these cases, however, discloses that there was no statutory enactment similar to C. S., 6460. Indeed, practically the same question was decided by this Court in *McNeal v. Ins. Co.,* 192 N. C., 450, 135 S. E., 300.

Affirmed.

L. W. GREENE AND WIFE, F. J. GREENE, v. THE ÆTNA INSURANCE COMPANY.

(Filed 5 December, 1928.)

1. **Insurance—Contract—Construction and Operation—Statutes.**

The material provisions of the standard form of a fire insurance policy written in accordance with C. S., 6436, 6437, are those of the law.

2. **Insurance—Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy—Vacancy Permits—Agents.**

The statutory form of a standard fire insurance policy requiring a permit to be issued for the house insured when unoccupied for more than ten days is a provision materially affecting the risk, and must be obtained in accordance with the requirements of the policy to make the insurer liable for damages by fire occurring after ten days vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of the written instrument. C. S., 6436, 6437.

3. Same.

The acts and conduct of a local agent for the insurer, issuing a statutory standard policy of fire insurance, made contrary to the written provisions of the policy relating to a vacancy permit, which materially affects the character of the risk, will not be imputed to the insurer after the contract of insurance has been delivered and becomes a binding contract, and will not be regarded as a waiver by the company or its stipulation that rendered the policy void.

STACY, C. J., and CLARKSON, J., dissenting.

APPEAL by defendant from *Harwood, Special Judge,* at March Term, 1928, of UNION. Reversed.

Action upon policy of fire insurance. The issuance of the policy, and the destruction by fire of the house insured thereby, prior to the expiration of the policy, according to its terms, are admitted in the pleadings.

Defendant denies liability upon the policy, and in support of such denial alleges that at the date of the fire, which destroyed the house described therein, the said policy was void, and of no effect, for that said house was on said date, and had been for more than ten days prior thereto, vacant and unoccupied. It relies upon a provision of said policy to the effect that "unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring while the described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days." It alleges that no agreement in writing had been added to said policy, by which defendant company agreed to remain liable on said policy, notwithstanding the house had become and should remain for more than ten days vacant and unoccupied.

In reply, plaintiffs allege that said house was occupied by them, as owners, at the date of the issuance of said policy; they admit that said house was vacant and unoccupied, as alleged in the answer, and that no agreement in writing had been added to the policy, with respect to such vacancy. They allege, however, that when they moved out of and vacated said house, they notified the agent of defendant, who had issued said policy, that said house was then and would remain vacant and unoccupied for an indefinite time, and that said agent, acting for and in behalf of defendant, consented and agreed that said policy should remain in full force and effect, notwithstanding such vacancy; they further allege that defendant, by its conduct, waived the provision of said policy, with respect to the vacancy of said house and that because of such waiver, the said policy was in full force and effect on the date of the fire.

Answering the allegations in the reply of the plaintiffs, with respect to the waiver, defendant relies upon a provision of the policy to the effect that "no one has power to waive any provision or condition of this policy, except such as by the terms of the policy is the subject of agreement added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be waived by any requirement, act or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto."

By said policy defendant insured the house described therein against loss or damage by fire in the sum of $500. The evidence tended to show that the value of said house, on the day it was destroyed by fire exceeded $700.

The issues submitted to the jury were answered as follows:

1. Was the policy of fire insurance set out in the complaint in force and effect at the date ot the fire? Answer: Yes.

2. What amount, if anything, are the plaintiffs entitled to recover of the defendant? Answer: $500.

From judgment on the verdict defendant appealed to the Supreme Court.

John C. Sikes for plaintiff.
Vann & Milliken for defendant.

CONNOR, J. The policy of insurance, upon which plaintiffs seek to recover in this action, was issued by the local agent of defendant company at Monroe, N. C., on 25 November, 1925. It was on said date a valid contract between the defendant and the plaintiffs. There was no contention to the contrary, on the part of either the defendant or the plaintiffs. The policy is in the form prescribed by statute enacted by the General Assembly of this State, and is known and designated as the Standard Fire Insurance Policy of North Carolina. C. S., 6436, and C. S., 6437. The rights and liabilities of both the insured and the insurer are fixed by the terms of the policy, which is in writing, as required by the statute. The stipulations and conditions of the policy are in the identical language of the statute. As was said of a similar policy in *Black v. Ins., Co.,* 148 N. C., 169, 61 S. E., 672, 21 L. R. A. (N. S.), 578, "they are inserted in the policy, not by the defendant company, or by the plaintiffs, but by the statute. To fail to give them force and effect is to nullify the statute."

There is no contention in the instant case that any representations were made by the defendant, or by its agent who issued the policy, at the time of its issuance, which were calculated or intended to deceive the plaintiffs, with respect to the terms, stipulations or conditions of the policy. Nor is there any suggestion that these terms, stipulations or conditions are ambiguous, misleading or confusing. In *Lancaster v. Ins. Co.,* 153 N. C., 285, 69 S. E., 214, it was said by this Court: "Our decisions are to the effect, and they are in accord with the generally prevailing doctrine, that where a person of mature years and sound mind, who can read and write, accepts a policy of insurance, containing stipulations material to the risk, and on breach of which the policy is to be avoided, and there is nothing confusing or ambiguous in them, and no representations made which are calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced while it stands, according to its terms, and the principle should not be affected because in a given case there has been no previous application, or no express representation made." This clear and full statement of the law with respect to insurance policies by *Hoke, J.,* has been subsequently approved by this Court. *Williams v. Ins. Co.,* 184 N. C., 268, 114 S. E., 161. The principle is peculiarly applicable where the policy involved, with its terms, stipulations and conditions, as in this case, is in the form prescribed by statute.

For the purposes of this appeal, it may be conceded that there was evidence tending to show that within less than ten days after plaintiffs moved out of and vacated the house insured by the policy, they notified the local agent of defendant company at Monroe, N. C., that said house was then and would be vacant and unoccupied for an indefinite period, and that said agent advised plaintiffs that such vacancy and unoccupancy would not affect the validity of the policy. There was no evidence from which the jury could find that plaintiffs, at any time after the policy was issued and prior to the date of the fire which destroyed the house, requested the defendant or its agent to issue to them a vacancy permit, in writing, to be added or attached to the policy. No agreement in writing was added or attached to said policy prior to the date of the fire, by which defendant waived the stipulation therein, that said defendant should not be liable for loss or damage occurring while the house described in the policy was vacant or unoccupied, beyond a period of ten days. This is a valid stipulation, and was included in the policy in accordance with the requirements of the statute. In *Bias v. Globe & R. F. Ins. Co.,* 85 W. Va., 134, 101 S. E., 247, 8 A. L. R., 373, it is said: "It is very uniformly held that a condition or stipulation in a policy of fire insurance, providing that the same shall be rendered void if the premises insured shall remain vacant and unoccupied for a specific length of time, is a reasonable and binding condition, and should such premises be destroyed by fire while vacant and unoccupied, and after the same had so remained, for a longer time than that provided in the policy, the insurer will be discharged from paying the indemnity therein provided." The principle therein stated was applied by this Court in *Alston v. Ins. Co.,* 80 N. C., 327, with respect to a stipulation in a policy of fire insurance, that the policy should be void, if the insured premises should be used so as to increase the risk, or should become vacant and unoccupied, without the assent of the company endorsed thereon. The principle does not depend upon the doctrine of increased risk, where the stipulation with respect to the vacancy of the premises insured is in the language prescribed by statute for the Standard Fire Insurance Policy.

Upon the facts admitted in the pleadings in the instant case, defendant company cannot be held liable under its policy to plaintiffs for loss or damage resulting from the destruction by fire of the house described in said policy, unless defendant by its conduct has waived the stipulation with respect to the vacancy or unoccupancy of said house. It is admitted that said house became vacant and unoccupied after the issuance of the policy, and remained so from 23 January to 16 August, 1926, when it was destroyed by fire, and that no agreement in writing was added to said policy by which defendant agreed to continue liable on said policy, notwithstanding such vacancy or unoccupancy.

Conceding that there was evidence tending to show (1) that plaintiffs, on or about 23 January, 1926, while the policy was in full force and effect, notified the local agent of defendant company, who had issued the policy, that the house was then vacant and unoccupied, and would remain so for an indefinite time; (2) that said agent then advised plaintiffs that such vacancy and unoccupancy did not and would not render the policy void and (3) that defendant did not thereafter, at any time prior to the date of the fire, declare said policy void, or do or say anything to make the forfeiture, resulting from the breach of the express stipulation contained therein, effectual, it must be held in accordance with authoritative decisions of this Court, which are in accord with decisions of courts of other jurisdictions, that there was no evidence from which the jury could find that defendant by its conduct, and because of such facts, waived the breach of the express stipulation in the policy, with respect to the vacancy and unoccupancy of said house.

Conditions with respect to the property insured by a policy of fire insurance, existing at the time the policy was issued, and known by the agent of the company, who issued the policy, cannot be relied upon to defeat the liability of the company under the policy, for notwithstanding the provisions of the policy, the knowledge of the agent is imputed to the company. When the policy is issued, with such knowledge, it will be held that the company has waived the breach of stipulation and provisions contained therein, which would otherwise render the policy void, at its inception. In such case, the doctrine of waiver is applied by the courts, upon well settled principles of equity. *Aldridge v. Ins. Co.,* 194 N. C., 683, 140 S. E., 706; *Bullard v. Ins. Co.,* 189 N. C., 34, 126 S. E., 179; *Ins. Co. v. Lumber Co.,* 186 N. C., 269, 119 S. E., 362. The provision in the policy restricting the power of the agent to waive express conditions and stipulations contained therein has been held to apply only to breaches which occur after the policy has been issued, and not to conditions existing at the inception of the policy, which but for the principle underlying the doctrine of waiver would render the policy void at the date of its issuance. *Johnson v. Ins. Co.,* 172 N. C., 142, 90 S. E., 124.

After a policy has been issued, and has become a valid and binding contract between the parties, knowledge by the agent, who issued it, of the breach of a stipulation or condition, which by the express terms of the policy, renders it void, will not be imputed to the company. In such case, forfeiture of the policy, for such breach, can be waived only in accordance with the provisions of the policy. *Smith v. Ins. Co.,* 193 N. C., 446, 137 S. E., 310.

In the instant case the policy was delivered to the plaintiffs on or about 23 January, 1926; it remained in their possession at all times until the destruction by fire of the house insured thereby, on 16 August, 1926. During this time the house was continuously vacant and unoccupied, in breach of the express stipulation in that respect of the policy. The principle upon which *Hardin v. Ins. Co.,* 189 N. C., 423, 127 S. E., 353, was decided is applicable. It is said in the opinion in that case, that a person who can do so is generally required to read a written contract before signing or accepting it, and ordinarily his failure to do so is negligence for which the law affords no redress. There was no evidence upon the trial of this case from which the jury could find facts upon which the doctrine of waiver could be applied for the relief of plaintiffs. There was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. The motion should have been allowed and the action dismissed. The judgment on the verdict is

Reversed.

STACY, C. J., and CLARKSON, J., dissent.

CHARLOTTE T. HINTON v. OVAN A. HINTON.

(Filed 5 December, 1928.)

1. **Jury—Qualifications of Jurors—Alienage.**

While alienage is not a statutory disqualification of a juror, C. S., 2312, it existed at common law, not changed by statute, and is recognized as a disqualification in the courts of this State. C. S., 970.

2. **Same—Duration of Disqualification.**

Alienage disqualifies a person from serving as a juror until the process of naturalization has been completed.

3. **New Trial—Grounds—Disqualifications of Jury—Verdict.**

Where under examination for cause a juror has misstated the fact that he was an alien, and it is made to appear that the party examining him was misled thereby and would not have accepted him had the truth been known to him, on appeal the action of the trial judge in setting aside an adverse verdict as a matter of law will be sustained.

4. **Motions—Hearings—Agreement of Parties for Hearing at Subsequent Term—Judges.**

Where a party to the action has duly moved to set aside the verdict of the jury for the disqualification of a juror serving thereon, the adverse party may not successfully object that the motion was acted upon at a subsequent term of the court when he had consented to the continuance of the motion.

CIVIL ACTION, before *Sinclair, J.,* at June Term, 1928, of NEW HANOVER.

The plaintiff instituted an action against the defendant, her husband, for support under C. S., 1667. The issue was answered by the jury in favor of the plaintiff. There was a motion to set aside the verdict and the following judgment was rendered:

"This cause having been called for trial and being heard at the March Term, 1928, and the jury having rendered its verdict and upon the rendition of said verdict the defendant moved the court to set aside the same, which motion has been, by consent, continued to this date for determination.

And the respective parties having filed affidavits; and upon the hearing of the motion the court finds as a fact that one of the jurors, William Ehlers, was by counsel for the defendant, examined as to his competency to sit as a juror, and was asked if he was a citizen of the United States? To which the said juror replied 'Yes,' when in truth and fact he was an alien and not a citizen of the United States. And had said juror stated that he was not a citizen of the United States, counsel for the defendant would have rejected him as being disqualified. The court further finds as a fact that the defendant had not exhausted his last peremptory challenge at the time defendant passed said juror.

The court further finds as a fact that counsel for the defendant were misled by the juror's answer as aforesaid.

Upon the foregoing facts the court, being of the opinion that the defendant is entitled to have the verdict set aside and a new trial ordered:

It is now, therefore, ordered by the court, that the verdict be, and the same is hereby set aside and a new trial ordered as a matter of law.

It is further ordered that the order of the Hon. W. A. Devin heretofore entered in this cause be continued in force until the case is retried or until the further order of the court."

From the foregoing judgment the plaintiff appealed.

Rodgers & Rodgers for plaintiff.
E. K. Bryan and L. Clayton Grant for defendant.

BROGDEN, J. Is an alien qualified to act as a juror?

The statutory qualifications for jurors are contained in C. S., 2312. Alienage is not a statutory disqualification for jury service in this State, but the common law prevails in this jurisdiction except to the extent it is repealed or modified by statute. C. S., 970. Under the common law an alien was not qualified to serve as a juror. 1 R. C. L., 802; *Reich v. State,* 53 Ga., 73; *People v. Baker,* 27 N. W., 539. As far back as 1824 this Court decided in *Ex parte Thompson* that an alien was not qualified to serve as an attorney at law for the reason that an attorney is an integral part of the administration of justice in our courts. By analogy a juror is equally an integral part of the due administration of the law. The common law theory of a jury was based largely upon the idea of vicinage. Thus, in *S. v. Cutshall,* 110 N. C., 538, 15 S. E., 261, the Court said: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." Indeed, this principle has been so far extended as to require that jurors must be residents of the county where the action is instituted, subject, of course, to such statutory modifications as have been prescribed from time to time. *S. v. White,* 68 N. C., 159; *S. v. Upton,* 170 N. C., 769, 87 S. E., 328; *S. v. Levy,* 187 N. C., 581, 122 S. E., 386.

It is clear, therefore, that the law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law.

Alienage continues after the declaration of intention and until the process of naturalization has been completed. *Atkins v. Kron,* 43 N. C., 1; *Harman v. Ferrall,* 64 N. C., 474. Hence it follows that Ehlers was not a qualified juror. The defendant had the right to challenge this juror, and he undertook through counsel to exercise this right. Of course, the fact that an incompetent juror was permitted to serve would not have vitiated the verdict, because a party has the right to challenge a juror in order to ascertain his qualifications. *S. v. White, supra.* However, the trial judge has found as a fact that the defendant, in attempting to exercise his right of challenge was misled by the juror, "and had said juror stated that he was not a citizen of the United States, counsel for the defendant would have rejected him as being disqualified." Under this finding of fact by the trial judge counsel was deprived of exercising his right of challenge through no fault of his own. Therefore, upon the finding of fact, we hold that the trial judge ruled correctly in setting aside the verdict.

It appears from the record that the verdict was set aside at a subsequent term of court, but it also appears that the motion to set aside the verdict was duly made at the time it was rendered and that the motion was continued by consent. Hence the plaintiff cannot complain of this aspect of the case.

Affirmed.

HUGHES & RAY v. MITCHELL COUNTY.

(Filed 5 December, 1928.)

Evidence—Parol or Extrinsic Evidence Affecting Writings—Explaining Written Contract.

In this action to recover profits prevented by the alleged breach of contract by a county for the construction of a public highway: *Held,* the written contract was sufficiently ambiguous to admit of parol evidence not contradictory thereof, and that plaintiff was estopped by accepting final payment thereunder. As to construction of the contract by the engineer, see *Lacy v. State,* 195 N. C., 284.

APPEAL by plaintiffs from *Finley, J.,* at July Term, 1928, of MITCHELL. No error.

Action to recover for loss of profits, resulting from breach of contract, by which plaintiffs agreed to grade, build and improve a certain highway in Mitchell County, approximately eleven miles in length. Defendant agreed to pay plaintiffs for work done on said highway in accordance with a scale of "unit prices" set out in said contract, which is in writing. The quantity of work of various kinds to be done by plaintiffs is not fixed by the terms of said contract.

It is alleged in the complaint that defendant, in breach of said contract, refused to permit plaintiffs to do all the concrete work, and all the rubble masonry, which they had contracted to do, and that by reason of such refusal plaintiffs had suffered damages by the loss of profits. This allegation is denied in the answer.

The issue submitted to the jury was answered as follows: "What amount, if anything, are plaintiffs entitled to recover of defendant? Answer: Nothing."

From judgment on the verdict plaintiffs appealed to the Supreme Court.

Morgan & Ragland for plaintiffs.
S. J. Black, McBee & Berry and Chas. E. Greene for defendant.

PER CURIAM. It is admitted that defendant has paid plaintiffs in full for all work done by them under the contract, in accordance with the scale of prices set out therein.

In this action plaintiffs seek to recover of defendant profits which they allege they would have made, if they had been permitted by defendant to do all the concrete work and all the rubble masonry required for the construction of the highway which plaintiffs agreed to grade, build and improve. Defendant contends that the contract did not include concrete work and rubble masonry required for the construction of bridges on said highway, and that therefore it did not breach said contract when it contracted with a third party for the construction of said bridges. The decision of the controversy between plaintiffs and defendant involves primarily a construction of the contract between them, which is in writing.

The evidence submitted to the jury, subject to the exceptions of plaintiffs, did not tend to add to, alter, vary or contradict the terms of the written contract. The admission of this evidence did not violate the well settled principle stated in *Thomas v. Carteret County,* 182 N. C., 374, 109 S. E., 384, and in many other cases. The evidence was competent for the purpose of showing, as it tended to do, that at the time they entered into the contract, and while they were engaged in its performance, plaintiffs knew that the contract did not include the work which they now contend was included therein. There is sufficient ambiguity and indefiniteness in the language of the written contract, with respect to the quantity of work of various kinds to be done by plaintiffs, under the contract, to make extrinsic evidence competent upon the issue submitted to the jury upon the trial of this action. *Lewis v. Nunn,* 180 N. C., 159, 104 S. E., 470.

There was evidence also tending to show that plaintiffs are precluded from making the contention upon which this action is founded by the construction of the contract made by the engineer, *Lacy v. State,* 195 N. C., 284, 141 S. E., 886, and also by their acceptance of a voucher in payment for the final estimate. *DeLoache v. DeLoache,* 189 N. C., 394, 127 S. E., 419.

Plaintiffs' assignments of error on their appeal to this Court cannot be sustained. The judgment is affirmed.

No error.

JAKE NEELY, ADMINISTRATOR, v. P. S. MINUS.

(Filed 12 December, 1928.)

1. **Death—Actions for Wrongful Death—Limitations.**

   The requirement that a suit to recover damages for a wrongful death shall be brought within one year is a condition annexed to the right of action and it must be shown by the plaintiff that he has complied therewith, C. S., 160, and it is not necessary for the defendant to plead it as a statute of limitations.

2. **Same—Discontinuance.**

   Where there is a break in the continuity in the issuance of alias and pluries summonses in a civil action to recover damages for a wrongful death there is a discontinuance, and service of a summons thereafter commences a new action, and if issued more than one year after the wrongful death the action will be dismissed.

3. **Same—Nonresidents.**

   The requirements that the plaintiff must bring his action for wrongful death within one year and issue alias and pluries summonses when the original has not been served as the statutes direct, applies where the defendant is a nonresident.

4. **Process—Service—Alias and Pluries Summonses and Chain of Summonses—Discontinuance—Action.**

   Where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action.

5. **Process—Issuance—Duty to Issue—Clerks of Court.**

   By chapter 66, Public Laws 1927, construed with C. S., 476, the clerk of the court from which a summons in a civil action has been issued

is required to issue an alias or pluries summons if the process officer has not had time to serve the original within the time prescribed by statute, without the necessity of the plaintiff in the action applying therefor.

CIVIL ACTION, heard before *Webb, J.*, at January Term, 1928, of GASTON.

The plaintiff is the administrator of Robert Torrence, who died on 12 May, 1926, as the result of personal injuries alleged to have been inflicted through the negligence of the defendant while engaged in moving a concrete mixer. The defendant was a nonresident of the State. Thereafter, on 29 January, 1927, a summons was issued against the defendant, returnable on 14 February, 1927. This summons was not served, and thereafter purported alias and pluries summonses were issued from time to time. It is unnecessary to set out a list of the various summonses.

At the conclusion of the evidence there was judgment of nonsuit, and from such judgment plaintiff appealed.

George W. Wilson for plaintiff.
George B. Mason for defendant.

BROGDEN, J. When is a summons returnable under the provisions of chapter 66, Public Laws 1927, or section 476 of the North Carolina Code of 1927?

The act of 1927 made material changes in the law theretofore existing. Formerly a summons was returnable before the clerk "at a date named therein not less than ten nor more than twenty days from its issuance." The act now in force provides that a summons must be returnable before the clerk and must notify the defendant to appear and answer the complaint within thirty days after service thereof. It is further provided, however, that the sheriff to whom the summons is addressed, must serve the same within ten days after the date of issuance, and if not served within ten days, it must be returned by the officer holding the same for service to the clerk of the court issuing the summons, "with notation thereon of its nonservice and the reasons therefor as to every defendant not served." By implication only, it would appear that a summons in a civil action is now returnable within ten days. If it shall appear from the return made by the officer that the summons could not be served for want of time, then the clerk within three days shall issue "an alias or pluries summons." C. S., 480, makes it the duty of the plaintiff "to sue out an alias or pluries summons" when the defendant has not been served. In this aspect C. S., 476 and 480, are in conflict, unless it be understood that if the officer holding the summons has not had time within which to make the service, in such event only, the duty of issuing an alias or pluries within three days is directly imposed upon the clerk. This, of course, imposes upon the clerk the burden of scrutinizing closely the return made on every summons issued through his office. As to whether this burden should be imposed upon the clerk or not is a question for legislative and not judicial determination. C. S., 481, provides that "a failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued."

In the case at bar, the question standing at the threshold is whether or not there has been a discontinuance. The plaintiff's intestate died as a result of personal injuries on 12 May, 1926. The first summons was issued on 29 January, 1927, and was returned unserved because the defendant was a nonresident of the State. Thereafter various summonses were issued from time to time and all returned by the sheriff with a notation that the defendant could not be found. On 1 September, 1927, a summons, marked "original" was issued by the clerk of Gaston County directed to the sheriff of said county. The return thereon shows the following: "Received 1 September, 1927, executed .... The defendant not to be found in Gaston County." Thereafter on 13 September, 1927, a pluries summons was issued, and the return shows that it was received on 15 September, but does not appear to have been executed, and no return appears thereon. Thereafter on 5 October an original summons was issued by the clerk of Gaston County, directed to the sheriff of Buncombe County. The return on this summons shows that it was received on 6 October, 1927, and duly served on 8 October, 1927. The complaint was filed on 4 May, 1927, and the answer filed on 31 October, 1927.

From the record facts as set out, there is a clear discontinuance of the cause between 1 September, 1927, and 5 October, 1927.

The plaintiff, however, contends that C. S., 160, providing that an action for wrongful death must be brought within one year after such death, does not apply to a nonresident defendant. Our decisions are to the effect that the provision of law that a suit for wrongful death must be brought within one year, is a condition annexed and must be proved by the plaintiff to make out a cause of action, and is not required to be pleaded as a statute of limitation. In other words, the provision of the statute is annexed to the cause of action and not to the person of the defendant. Therefore, the provision applies with full force whether the defendant be a resident or a nonresident. *Bennett v. R. R.,* 159 N. C., 345, 74 S. E., 883; *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529; *McGuire v. Lumber Co.,* 190 N. C., 806, 131 S. E., 274; *Hanie v. Penland,* 193 N. C., 800, 138 S. E., 165. The record discloses that a blanket order was made by the clerk on 31 March, 1927, that "alias and pluries summons" be issued from time to time, but this order does not authorize the issuing of the summons of 5 October, 1927, which was duly served upon the defendant. The principle of law applicable to the facts appearing upon the present record is stated in *McGuire v. Lumber Co., supra,* as follows: "Therefore, when the plaintiff failed to take any steps, whatever, to sue out an alias summons on the return date, to wit, 28 July, 1925, the sheriff of Swain County, having not returned the process prior to that time showing whether service had been made or not, a discontinuance resulted as is contemplated in C. S., 480, 481."

Affirmed.

MARY K. HOLTON v. EAGLE INDEMNITY COMPANY.

(Filed 12 December, 1928.)

1. **Insurance—Construction of Contract—Conditions and Provisions—Persons Insured.**

An "Omnibus clause" in a policy indemnifying the owner and others driving his automobile with his consent against loss by damages is rendered inoperative as to such others by a provision expressly made a part of the policy, restricting the liability when such other person is not named in the policy as an insured.

2. **Same.**

Where a prospective buyer of an automobile pays a judgment recovered against her for negligent injury caused by her while driving an automobile owned by a dealer who has a policy of insurance thereon to indemnify him against loss, in her suit against the insurance company to recover the amount of the judgment under the policy issued to the dealer, the question of whether she was agent or bailee of the dealer does not arise, the dealer having suffered no loss and being solely protected by the policy.

CLARKSON, J., dissents.

APPEAL by defendant from *Harding, J.,* at September Term, 1928, of MECKLENBURG. Error.

Action upon policy of automobile insurance, by which defendant agreed to indemnify the owner of an automobile, as the insured named therein, against loss, arising from liability for damages, by reason of the ownership, maintenance or use of said automobile.

Plaintiff contends that by the terms of the "Omnibus clause," included in the body of said policy, defendant also agreed to indemnify her, as the driver of said automobile, with the permission of its owner, against loss sustained by her, arising from her liability for damages, while driving said automobile.

Defendant denies any liability to plaintiff, under said policy; it contends that the provisions of the "Omnibus clause," included in the body of the policy, were expressly abrogated by an endorsement made on said policy, in accordance with a specific provision thereof; it alleges that by the terms of said endorsement, it is liable, under the policy, only to the insured named therein, to wit: C. P. Motors, Inc., the owner of the automobile, which plaintiff was driving, when her liability for damages accrued.

From judgment upon facts agreed, defendant appealed to the Supreme Court.

Preston & Ross and T. A. Adams for plaintiff.
John M. Robinson for defendant.

CONNOR, J. On 15 May, 1926, an automobile, owned by C. P. Motors, Inc., of Charlotte, N. C., and legally operated, with the permission of said owner, by plaintiff, as driver, collided with a truck. The collision occurred on a public highway in this State, while plaintiff was driving the automobile, as a prospective purchaser. At the time of the collision, she was not accompanied by any agent or employee of C. P. Motors, Inc. She was driving alone.

The collision resulted in injuries to the truck and to a person riding on it. The owner of the truck, and the person injured brought an action for damages, resulting from their respective injuries, against C. P. Motors, Inc., as owner, and against plaintiff herein, as driver of the automobile. Upon the trial of said action, at the close of the evidence for the plaintiffs therein, the motion of C. P. Motors, Inc., for judgment as of nonsuit, was allowed. The action was dismissed as to C. P. Motors, Inc. The trial proceeded as to plaintiff herein, and resulted in a verdict against her, upon the issues involving her liability for damages, and in a judgment for the plaintiffs therein against her for the damages assessed by the jury.

Prior to the commencement of this action, plaintiff paid and fully discharged said judgment; she has also paid the fee of her attorney, who defended said action, in her behalf. Plaintiff has, therefore, sustained a loss, arising out of her liability, for damages, by reason of the legal operation of said automobile by her, with the permission of its owner. She contends that by the terms of the policy of insurance upon which this action is brought, defendant is liable to her for the amount of her loss.

Defendant had issued said policy of insurance prior to 15 May, 1926; it was in full force and effect at said date.

By the terms of said policy, as set out in the "Omnibus clause," included in its body, defendant agreed to indemnify against loss, arising out of liability for damages, by reason of the ownership, maintenance or use of the automobile, owned by C. P. Motors, Inc., and driven by plaintiff, on 15 May, 1926, (1) "The named insured"; (2) "any person or persons, while riding in or legally operating" said automobile; or (3) "any person, firm, or corporation legally responsible for the operation thereof, providing such riding, use or operation is with the permission of the named insured." The "named insured" in said policy is C. P. Motors, Inc.

It is further provided in the body of said policy "that the insurance hereby made is and shall be subject to the conditions hereinafter set forth, and to the memoranda, if any, endorsed hereon, in like manner as if the same were respectively repeated and incorporated herein, and compliance with such conditions, and memoranda, and each of them, shall be a condition precedent to the right of recovery hereunder."

Two endorsements were made on said policy, at the date of its issuance, both of which, with all their provisions, thereby became incorporated in said policy, as parts thereof. One of these endorsements contains a provision, in words as follows:

"It is further understood and agreed, notwithstanding anything to the contrary therein, that the policy covers the insured named in statement 1 of the schedule, exclusively, and insurance thereunder does not extend to any other person, firm or corporation, unless such person, firm or corporation is added to the policy by means of a valid endorsement." The name of the plaintiff does not appear by endorsement or otherwise upon the policy. From her right to recover in this action, plaintiff relies solely upon the "Omnibus clause" in the policy.

The manifest purpose and the legal effect of the provisions in the endorsement was to restrict the liability of defendant, under its policy of insurance, to C. P. Motors, Inc., as the insured named in statement 1 of the schedule, contained in the policy, and to that extent abrogate and nullify the provisions of the "Omnibus clause." It may be conceded that upon the facts agreed, under the terms of the "Omnibus clause," included in the body of the policy, defendant would have been liable to plaintiff in this action, as contended by her; it must be held, however, that these terms, in so far as they extended to or covered the plaintiff, upon the facts agreed, were abrogated and nullified, by the provision included in the endorsement, which by an express provision of the policy, is a part thereof. Defendant's liability, under the policy, is restricted to "the named insured," that is, to C. P. Motors, Inc., it does not extend to or cover others, to whom, but for the provision in the endorsement, under the terms of the "Omnibus clause," it would have been liable. See *Dickinson v. Maryland Casualty Co.,* 101 Conn., 369, 125 Atl., 866, 41 A. L. R., 500.

The contention of plaintiff that upon the facts agreed she was the agent of C. P. Motors, Inc., and became liable for damages while driving the automobile as such agent, cannot affect the decision of the question presented by this appeal. She has paid the damages, caused by her negligence. C. P. Motors, Inc., has sustained no loss for which defendant, under its policy, is liable, either to plaintiff or to C. P. Motors, Inc. Whether or not, upon the facts agreed, plaintiff was the agent of C. P. Motors, Inc., at the time she incurred liability for damages, is immaterial. We think, however, that upon the facts agreed, she was bailee, and not agent of the owner of the automobile. *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33.

The only assignment of error upon defendant's appeal to this Court, is based upon its exception to the judgment. This assignment is sustained. There is error in the judgment, which is set aside, to the end that judgment may be entered that plaintiff take nothing by her action and that defendant recover its costs.

Error.

CLARKSON, J., dissents.

STATE v. RUSSELL AND EDGAR MULL.

(Filed 12 December, 1928.)

1. Criminal Law—Evidence—Flight of Defendant as Evidence—Explanation of Flight—Homicide.

Flight of the accused after a homicide has been committed is competent with other relevant evidence as a circumstance to show guilt, subject to the explanation of the defendant, and he may give his testimony that he had been informed that the relatives of the deceased, of dangerous character, had threatened his life, and that he had been advised by his father to flee.

2. Same—New Trial.

When the defendant on trial for a homicide has been excluded from testifying to facts in explanation of his flight after the offense had been committed, and it is made to appear on appeal that such evidence was material to his defense, a new trial will be ordered.

3. Same.

The credibility of the testimony of the defendant on trial for homicide in explanation of his flight thereafter, is for the jury.

CRIMINAL ACTION, before *Finley, J.,* at March Term, 1928, of BURKE.

The defendants, Russell and Edgar Mull, were charged with the murder of Tony Lafevers. The solicitor did not ask for a verdict for murder in the first degree, but for a conviction of murder in the second degree or manslaughter.

The evidence tended to show that on the night of 26 June, 1926, Gerald Mull had an ice-cream supper in an open field near Morganton. The defendants, who are brothers, and the deceased were present. There was a conflict in the testimony of the witnesses for the State and for the defendants. The deceased and the defendant, Edgar Mull, engaged in a fight, and the deceased was knocked down by said defendant, who was unarmed. Thereupon the deceased drew a pistol and fired at the defendant, Edgar Mull, inflicting a severe wound. The other defendant, Russell Mull, hearing the commotion, ran to the scene of the conflict and shot Tony Lafevers and killed him. It is impossible to harmonize the testimony with respect to how the fight started and who was the aggressor. The two defendants, however, left the place of the killing and went down on the river where they remained in hiding for about ten days, and then they departed for a western state where they remained until about 4 January, 1928, when they returned to Burke County and voluntarily surrendered to the sheriff.

Edgar Mull was acquitted, but Russell Mull was convicted and sentenced to a term of not less than three nor more than five years in the State's prison, and he appealed.

Avery & Patton, Spainhour & Mull and Ervin & Ervin for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. Is a defendant who flees after committing a felony, entitled to explain the circumstances of his flight and the inducements thereto?

A witness for the State was asked if he knew where the defendants were from 26 June, 1926, to 1 January, 1928, and he testified that they were not in Morganton after that night until the first of the year 1928. Thereafter, the defendant, Edgar Mull, while being examined as a witness, was asked the following question: "What, if anything, induced you to remain in hiding down on the river and to leave the State?" Objection was made by the State and the answer excluded. The record discloses that if permitted to answer, the witness would have said: "The night of the trouble Russell and me were informed that the brothers of Tony Lafevers were searching for us in the woods with guns. While we were hiding down on the river our father, Joe Mull, advised us to leave, and informed us that Herm and Andrew Lafevers, the brothers of Tony, had threatened to kill us on sight. I knew that Andrew and Herm had the general reputation of being dangerous men, and I did not want to have to kill anybody or to be killed. We left the State to let the excitement die down." The same testimony was again offered by the defendant and excluded by the court. The defendant, Russell Mull, testifying in his own behalf, was asked the same question and would have given the same answer, but the evidence was excluded by the court.

The law with respect to flight is thus stated in *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786: "While it is true, as contended by the defendant's counsel, that it was a circumstance from which, in connection with other circumstances, the jury might draw an inference of conscious guilt unless explained, the whole matter is for them to pass upon, and they must decide what weight they will give to the fact of flight, and if there was explanatory evidence to what extent it affects the probative force of the flight as a fact tending to show guilt." The weight to be attached to this circumstance is a matter for the jury to determine in connection with all the facts in the case.

Again, in *S. v. Hairston,* 182 N. C., 851, 109 S. E., 45, this Court said: "The law of early times made flight conclusive evidence of guilt. Under the more rational system of later times, the fact of flight is merely a circumstance tending to establish consciousness of guilt. It is settled that the defendant may offer any relevant explanation of his act. The accused may, for example, allege, in explanation of his flight, that he was apprehensive of personal violence. The advice of friends may be assigned as the cause of fleeing from the jurisdiction, and, in all cases, the accused is entitled to prove by his own testimony the actual motive which has influenced his conduct." The law contemplates that a defendant, in cases where flight is a relevant circumstance, has the right to explain the flight not only by his own testimony, but also by other proper proof, and the jury is to determine the weight to be given the explanatory evidence so offered.

The further contention that while the exclusion of the explanation of flight might be considered error, nevertheless the defendant in other portions of the testimony received the full benefit of such explanation. However, we do not so interpret the record. Both defendants were young men living in the home of their father. They testified that while they were in hiding the father came to them and advised them to leave the country because the brothers of the deceased were threatening to kill them on sight. It is not disclosed in any portion of the evidence that the defendants were permitted to testify as to what advice they received from their father. The advice of a father given to his own son in time of stress and excitement, would doubtless exert great influence upon the mind of the son. We, therefore, hold that the exclusion of the explanation offered by the defendants, was material error warranting another trial of the cause.

New trial.

J. B. EWING v. LEWIS KATES.

(Filed 12 December, 1928.)

Parent and Child—Liability of Parent for Negligence of Child in Driving "Family Car"—Agency.

Where the father directs his nineteen-year-old son to take his automobile to the place in which it was kept, and to leave it there, he is not liable in damages for the negligent driving of his son in afterwards taking the car out without his knowledge for his own purposes, the doctrine of the family car not applying to the facts of this case.

APPEAL by defendant from *Finley, J.*, at July Term, 1928, of MITCHELL.

Civil action to recover damages for an alleged negligent injury caused by a collision between plaintiff's Ford touring car, driven by his daughter, but in which plaintiff was riding at the time, and a Chrysler touring car, owned by the defendant, but which was being operated by defendant's minor son.

The evidence tends to show that on 14 October, 1926, the defendant took his Chrysler automobile and started for a bear hunt on South Toe River in Yancey County. At Micaville he decided not to proceed in his car and turned it over to Roy Bailey and asked him to drive it back to his store and give it to his son, Carl, and tell him to put it in the "side room," where it was usually kept, and leave it there until he, the defendant, came back. Carl Kates, defendant's minor son, 19 years of age, soon after receiving the car from Roy Bailey, took it out "on business for himself" and had a collision with plaintiff's car, injuring both the plaintiff and his daughter, as well as his car. Carl Kates had a car of his own, but it was in evidence that his father sometimes permitted him to use the Chrysler for his own pleasure and business.

The court instructed the jury as follows: "If you find that the son was operating the car under the custom he had been operating it under, and that on this occasion, notwithstanding the message, he took the car out and then drove it home and put it up in the shed—if you find that by the greater weight of the evidence you would answer in favor of the plaintiff." The defendant excepts to this instruction and assigns same as error.

From a verdict and judgment in favor of plaintiff, the defendant appeals.

Chas. E. Greene and Geo. L. Greene for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

STACY, C. J., after stating the case: It was said in *Robertson v. Aldridge,* 185 N. C., 292, 116 S. E., 742, that where a parent owns a car for the convenience and pleasure of his family, a minor child who is a member of the family, though using such car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined upon that basis. *Clark v. Sweaney,* 176 N. C., 529, 97 S. E., 474; *S. c.,* 175 N. C., 280, 95 S. E., 568.

The trial court evidently gave the instruction, which constitutes one of the defendant's exceptive assignments of error, upon this principle of law, and, under a certain state of facts, the instruction might not be objectionable. But there is neither allegation nor proof to bring the instant case within the "family purpose" doctrine. *Allen v. Garibaldi,* 187 N. C., 798, 123 S. E., 66. Hence, we think the instruction, as given, must be held for error on authority of what was said in *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096, and *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891.

New trial.

L. G. WALLACE ET AL. v. MARY ANGENELIA ESTES.

(Filed 12 December, 1928.)

Partnership—Evidence of Partnership.

The existence of a partnership must be shown *aliunde* the declarations of one of the members of the partnership, unless the declaration is made in the presence of the supposed partner who therein acquiesces, and the declaration of one that another was his partner, in the absence of the supposed partner and without his knowledge, is incompetent.

APPEAL by defendant from *Finley, J.,* at May Term, 1928, of CALDWELL. New trial.

John W. Aiken and L. S. Spurling for plaintiffs.
Newland & Townsend for defendant.

ADAMS, J. This is an action to recover the purchase price of merchandise sold by the plaintiffs to the Estes Mercantile Company. The plaintiffs alleged and the defendant denied that she was a partner in the business. In response to the issues the jury found that the defendant was not a copartner, but that she had held herself out or had permitted herself to be held out as a partner, and awarded the plaintiffs the amount demanded. The defendant excepted to the judgment and assigned several alleged errors.

J. K. Crouch, the plaintiffs' traveling salesman, was permitted to testify, subject to the defendant's exception, that W. T. Estes, the defendant's husband, told him that he (W. T. Estes) and his wife composed the Estes Mercantile Company. There was no evidence that the defendant was present when the declaration was made or that she had knowledge of it at any time. The defendant's objection to this evidence should have been sustained. In *Henry v. Willard,* 73 N. C., 35, it was said: "No principle of evidence is better established than that the declarations of a supposed partner are not admissible against the other, if made in his absence, unless the partnership is first established *aliunde.* It is true, in this case, that other evidence had been previously given, tending to establish the partnership, and perhaps sufficient to authorize the court to admit the declarations of Morris touching his acts and conduct under the partnership. But this is something altogether different from admitting declarations, the natural and only apparent effect of which was to establish the fact itself of the partnership. This fact can be established only by evidence foreign to and disconnected from the declarations of the alleged partner." See *Bank v. Hall,* 174 N. C., 477.

As suggested in the opinion incompetent declarations may be made competent for a special and particular purpose. An illustration of such special purpose is the admission of one declaration for the purpose of contradicting another. It is contended by the plaintiffs that the evidence of the witness Crouch was admitted only for the purpose of showing that the defendant knew that she was being held out as a member of the firm. It is stated, however, that it was admitted for the further purpose of corroborating the plaintiffs' theory that the defendant was a member of the mercantile company. We do not perceive how the defendant could know by reason of the declaration objected to that she was being held out as a member of the firm unless she had knowledge of it. To say that the evidence was competent for the purpose of

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corroborating the plaintiffs' theory is in effect to say that the evidence was competent for the purpose of showing that the defendant was a member of the firm.

There are other exceptions which would call for serious consideration but for the probability that they will not arise upon a second trial.

There was no error in denying the motion for nonsuit.

New trial.

STATE v. HOMER REED.

(Filed 12 December, 1928.)

Indictment—Indictment Drawn Under Statute Superseded by Later Act.

Where there is an erroneous conviction of wilful injury to personal property under C. S., 4331, when the indictment should have been drawn under chapter 61, Public Laws 1927, the prisoner should be discharged with permission to the solicitor to send another bill, if so advised.

Appeal by defendant from *Moore, J.*, at June Term, 1928, of Buncombe.

Criminal prosecution tried upon indictments charging the defendant with (1) larceny, (2) false pretense, and (3) wilful injury to personal property.

The evidence tends to show that the defendant hired an automobile from Clinton Littrell for approximately three hours, to go from Newfound to Canton, a distance of about twenty miles; that instead of going to Canton the defendant went to Asheville, a distance of about fourteen miles; that the defendant did not return the car at the time agreed upon and that when he did return it, the car was in a badly damaged condition.

Verdict: Guilty on all three charges.

From the judgments pronounced on the verdict, 12 months on each of the first two charges, and 6 months on the last, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Thos. A. Curry for defendant.

Stacy, C. J. The record discloses no evidence of larceny, a fatally defective charge of false pretense, and an erroneous conviction under C. S., 4331, with a sentence of 6 months on the roads, when the indictment should have been drawn under chapter 61, Public Laws 1927, and the sentence not more than 30 days imprisonment or a fine of not mor than $50.00.

Let the defendant be discharged, with permission to the solicit to send another bill, if so advised.

Reversed.

WESTERN CAROLINA POWER COMPANY v. L. F. KLUTZ ET AL.

(Filed 12 December, 1928.)

1. **Appeal and Error—Review—Discretionary Order of Judge Changing Venue Not Reviewable.**

   The transfer of a cause from the court of one county to another in the discretion of the trial judge for the convenience of witnesses and to promote justice, C. S., 470, is not reviewable on appeal to the Supreme Court.

2. **Venue—Changing Venue—Discretionary Power of Judge to Change Venue.**

   When the trial judge in the proper exercise of his discretion under C. S., 470, has transferred a cause from one county to another for trial, the question of his ultimate purpose to consolidate the cause with other like cases does not arise on appeal to the Supreme Court.

APPEAL by plaintiff from *Schenck, J.*, at Yadkinville, 16 May, 1928, from ALEXANDER.

Special proceeding instituted in the Superior Court of Alexander County to condemn land for the development of hydroelectric plant.

The cause was removed to Catawba County for trial, upon motion of counsel for respondents, the same being allowed by the court "in the exercise of its sound discretion, and by virtue of the authority vested in it by C. S., 470," as set out in the judgment.

Petitioner appeals, assigning error, in that the only purpose for removing said proceeding, either alleged or found by the court, was to permit a subsequent consolidation and trial with three other condemnation proceedings pending in the Superior Court of Catawba County, with respect to land on the opposite bank of the same stream, which petitioner alleges would be an improper consolidation.

J. H. Burke, R. S. Hutchison and W. S. O'B. Robinson, Jr., for petitioner.

Clyde Hoey and Manning & Manning for respondents.

STACY, C. J. Even if it be conceded that the present proceeding cannot properly be consolidated for trial with the three other condemnation proceedings pending in the Superior Court of Catawba County as petitioner alleges—which question is not presented and therefore not decided—still the motion to remove, on the grounds stated, "for the convenience of witnesses and to promote the ends of justice," C. S., 470, rests in the sound discretion of the trial court, and is not reviewable on appeal. *Perry v. Perry,* 172 N. C., 62, 89 S. E., 999; *Byrd v. Spruce Co.,* 170 N. C., 429, 87 S. E., 241; *Garrett v. Bear,* 144 N. C., 23, 56 S. E., 479.

Affirmed.

D. F. O'BRIEN v. PARKS CRAMER CO.

(Filed 12 December, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Tools and Appliances—Nonsuit.**

   Where an employee and his helper are required in the course of their employment to rivet sheet metal to the ceiling of a room by the use of an electrically driven drill which was defective in having a short-circuit, and this proximately caused a shock to the helper, who was standing on a ladder with the drill, causing him to fall upon the employee below, the plaintiff in this action, resulting in the damages in suit, the evidence is sufficient to take the case to the jury and uphold a verdict in the plaintiff's favor.

2. **Same—Notice of Defect in Tools or Appliances.**

   Evidence tending to show that a servant was injured in the course of his employment by a defective driller furnished for the purpose by the employer, and that the employer had been given notice of the defect and the danger of continuing to use the defective tool, it is prima facie sufficient to take the issue of actionable negligence to the jury, and a recovery of damages may be had when shown to have been proximately caused by the defect.

3. **Same—Duty to Inspect—Negligence in Failing to Inspect—Question for Jury.**

   Where there is evidence tending to show that the master furnished his servant a defective driller machine with which to do the work within the scope of his employment, and was informed of the defect, or by proper inspection should have known of the defect in time to have repaired the tool and avoided the injury, it is for the jury to determine whether he was negligent in failing to inspect.

4. **Same—Master Not Insurer Against Injury.**

   While it is the nondelegable duty of the master to furnish the servant a safe place to work and safe tools and appliances, and to keep them safe by reasonable inspection, under the rule of the ordinarily prudent man under the circumstances, it is not held that he is an insurer of the safety of the servant.

5. Same—Electricity—Res Ipsa Loquitur.

Where an electrically driven machine furnished by the master to the servant had previously shocked other employees, it is evidence of a defect therein and evidence that the master knew, or by the exercise of reasonable inspection should have known of the defect, and is sufficient to take the issue of the master's negligence to the jury, the doctrine of *res ipsa loquitur* applying.

6. Same—Anticipating Injury.

Where there is evidence tending to show that the servant was injured by the negligence of the master, it is not necessary for a recovery that the particular injury should have been foreseen, but it is sufficient if injury would likely or ordinarily follow the negligent act of the master.

7. Damages—Measure of Damages—Injuries to Person—Negligence—Master and Servant.

Permanent damages recoverable for the negligent act of another is the present net value of the difference between what the plaintiff would have earned and what he is able to earn in his present condition, taking into consideration his expectancy of life by the mortuary table, affected by evidence of his health, etc., immediately preceding the injury.

8. Trial—Instructions—Request for Instructions.

Where the instructions of the court to the jury are sufficiently comprehensive of the law arising upon the evidence, it is required that a party objecting thereto for indefiniteness must tender special instructions as to the particulars he desires more specific instructions upon.

APPEAL by defendant from *Lyon, J.*, and a jury, at April Term, 1928, of MECKLENBURG. No error.

This is an action for actionable negligence. Plaintiff, a machinist, was employed by defendant to work in its shop. At the time he was injured he was putting up sheet iron to enclose the shipping room. The foreman of the shop, J. L. Alexander, sent him to help Sam Williams, the boss of the shipping room. He had a helper, M. R. Smith, and they had to drill holes to connect the sash angle iron to the channel iron. A part of the sash angle iron was to be attached to the overhead. They had to be drilled to be fastened together. The place to drill was about 12 feet from the floor, and a step-ladder was used with round steps on it. An electric drill was used and the power was cut on and off. The drill was 7/16 weighing 25 to 30 pounds. Plaintiff and the helper had drilled some the day before. The floor was concrete. About a quarter to eight on the morning of 18 November, 1924, he and the helper started to drill. The plaintiff ground the drill and put it in the motor. To operate the drill he started up the ladder with it and Smith said "I'm a younger man than you are, let me go up the ladder." Smith went up the ladder. Plaintiff stood at the foot of the ladder to steady it. Smith got to the top of the ladder, about two steps of the top; Smith placed the drill and said, "Look out, I'm ready," and then he turned the power on with the latch. It was run by electricity. Plaintiff heard the helper scream, and the next thing plaintiff knew the drill hit him a glancing blow on the head and Smith fell on plaintiff's lower hip.

Plaintiff had been on the job in the shipping room a day or two before he was hurt and had used the drill the day before, and had put a plank across to stand on, but this was so close to the corner, that he and the helper discussed it the evening before with T. S. Simpson, shop engineer, as to whether this would be the best way to do it the next day, and he said "Just go up and drill it any way." Smith, the helper went up the ladder and took the drill with him, but could not get it started, so he put one hand on the drill and reached over to pull the latch off and then the volts grabbed him and he hollered once or twice and fell on his back. Smith was shocked and dropped the drill when he got loose, which struck plaintiff's head and he fell on the plaintiff. The plaintiff was steadying the ladder. Smith had not used the drill before.

It was in evidence that the drill was short circuited and when drilling with the drill, standing on a concrete floor, a person would be shocked if he touched it.

It was in evidence that the foreman of the shop, J. L. Alexander, was notified that it had a short circuit and that he ought to have it fixed. This was "something like ten days or two weeks" before plaintiff was hurt. Another witness stated it was "not very long" before plaintiff was hurt and that he complained to the foreman of the copper shop of defendant and he promised to fix it. It shocked both of these parties. There was also another witness, at a remoter period, that testified that the foreman of the copper shop of defendant was notified of the defect of the drill and warned of trouble if it wasn't fixed. It was also in evidence as to plaintiff's injuries, "He has complained about it since he was hurt. It hurt him continuously since . . . I know he suffered with his back." Plaintiff's doctor testified that he examined the plaintiff, "I found luxation of the sacro-illiac joint. That is the joint between one of the pelvic bones and the spinal column. Luxated means loosened. . . . I prescribed his having a bandage made and applied and worn." Plaintiff testified "I have not consulted a doctor lately, but when I went to see him, he gave me a belt to wear. I am still wearing it. I went to Dr. Wiley Moore the last time. He gave me the belt to wear. I can't work like I did. I can't stoop over to pick up anything. I could get down in half a day's time if I would try. I suffer pain from it, at times it is real bad. There are times when I can't get out of bed without pulling up by a post."

All the evidence was to the effect that plaintiff's helper was shocked by the electric current in the drill appliance, which caused him to fall and injure plaintiff.

The defendant denied negligence and set up the plea (1) Negligence of a fellow-servant; (2) Contributory negligence. The evidence of defendant contradicted that of plaintiff.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his own injury as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $6,000.00."

Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

J. D. McCall for plaintiff.
John M. Robinson for defendant.

CLARKSON, J. This is an action for actionable negligence between employer and employee. It was in evidence (1) That the electric drill was defective; (2) that the *alter ego* of defendant "not very long" before plaintiff was injured was notified of the defect and promised to fix it; (3) that the helper of plaintiff went up near the top of the ladder to drill and when he turned on the current to operate the electric drill he was shocked and dropped the drill, which struck plaintiff a glancing blow on the head, and the helper fell on the plaintiff's "lower hip," injuring him. Holes were being drilled in a channel iron to connect the sash angle iron to the channel iron. A step-ladder was used as the place to be drilled was about 12 feet from the floor. The floor was concrete. Plaintiff was steadying the step-ladder so the helper could drill. The appliance was defective as it was short circuited.

The court charged the jury as follows: "To establish actionable negligence, the plaintiff is required to show by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a reasonably prudent man would exercise under like circumstances and charged with a like duty; and, second, it must appear that such negligent breach of duty was the proximate cause of the injury, the cause that produced the result in continuous sequence and without which it would not have occurred and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. (A) Now, gentlemen of the jury, if you find from the evidence, and by its greater weight, the burden being on the plaintiff to so satisfy you, that the drill with which the plaintiff was directed to do his work, was out of repair and that it had a short circuit and that the defendant had been notified of its condition prior to the time of the occurrence or that the defendant could have by the exercise of ordinary care and by inspection have discovered its condition and you find from the evidence that it did not make the necessary repair, and that said machine was defective in that it had a short circuit and you find that was the proximate cause of the injury to the plaintiff, you would answer the first issue 'Yes.' If you do not so find, you would answer it 'No.' (B)." It will be noted that the charge uses "foreseen"—it is more liberal than the rule in this jurisdiction, which is as follows: In *Hudson v. R. R.,* 176 N. C., p. 492, *Allen, J.,* confirming the above rule, says: "To which we adhere, with the modification contained in *Drum v. Miller,* 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act." See *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., at p. 651.

We will repeat the law in this jurisdiction, reiterated recently in *Ellis v. Herald Co., ante,* at p. 264-5: "It is well settled that an employer is not a guarantor or an insurer of the safety of the place of work or of the machinery and appliances of the work. But it is the positive duty of the employer, which is primary and nondelegable, in the exercise of ordinary or reasonable care to furnish or provide his employee a reasonably safe and suitable place in which to do his work, and reasonably safe and suitable machinery and appliances. If there is a failure in this respect, and such failure is the proximate cause of any injury to an employee, the employer is liable," citing cases. *Cable v. Lumber Co.,* 189 N. C., 840; *Riggs v. Mfg. Co.,* 190 N. C., 256; *Lindsey v. Lumber Co.,* 190 N. C., 844; *Hall v. Rhinehart,* 191 N. C., 685; *Fowler v. Conduit Co.,* 192 N. C., 14; *Watson v. Tanning Co.,* 192 N. C., 790.

The defendant excepted and assigned error to the charge between "A" and "B" and contends that the charge places an absolute liability upon the defendant, after the discovery of a defect in machinery or appliances, and it is in contravention of the well settled law. We think defendant's contention is too attenuated and technical when the entire charge on the subject of negligence is considered and applied to the facts in this particular case and all of the charge on this particular aspect.

In *Womble v. Grocery Co.*, 135 N. C., at p. 486, it is said: "In regard to the second proposition, regarding the duty of inspection, we are of opinion, both upon reason and authority, that a failure to inspect an elevator approaches very near, if it does not constitute, negligence. The law is fully and ably discussed in Labatt on Master and Servant, chapter 11. 'Negligence on the part of the master may consist of act of omission or of commission, and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care. The duty of inspection being a positive and affirmative duty, to be continuously performed by the defendants, the Court could not say as a matter of law how often such inspection should have taken place, or that it was proper to omit it at some particular time. It was for the jury to say whether the defendants had used reasonable care in this respect. *Houston v. Brush, supra* (66 Vt., 331); Labatt, 157.' "

In *Cotton v. R. R.*, 149 N. C., at p. 230, the principle applicable is thus stated: "In respect to instrumentalities provided by the master for the use of the servant, the latter, in order to establish his case, must show: 1. That the implement furnished by the master was, at the time of the injury, defective. 2. That the master knew of the defect or was negligent in not discovering it and making the needed repairs. 3. That the defect was the proximate cause of the injury. *Hudson v. R. R.*, 104 N. C., 491; *Shaw v. Mfg. Co.*, 143 N. C., 131; *R. R. v. Barrett*, 166 U. S., 617. We may omit any reference to the duty of the servant to inform the master of any defect found by him, as there is no evidence in this case that fixes the plaintiff with any knowledge of the alleged defect in the truck, either in law or in fact. There is another duty the master owes to his servant and that is to inspect, at reasonable intervals of time, the implements he furnishes for use by his servant. 1 Labatt M. & S., sec. 154 and 157; Bailey's Pers. Inj., sec. 2638; *Leak v. R. R.*, 124 N. C., 455. At what intervals this inspection should be made, will depend upon the kind of implement used and special facts and circumstances of the case." *Shaw v. Handle Co.*, 188 N. C., 222. In the *Cotton case, supra,* the plaintiff was injured when the wheel of a truck came off. See Thompson Commentaries on the Law of Negligence (White's Sup.), Vol. 8, sec. 7681 note.

The agency used in the operation of the drill was electric current. As was said in *McAllister v. Pryor,* 187 N. C., at p. 836: "Electricity is recognized as an invisible force, subtle, with dangerous characteristics. It is important to encourage the use of the electric appliances, but it is necessary that this invisible and subtle force shall be carefully guarded."

In *Mincey, v. R. R.,* 161 N. C., at p. 471-2, it is said: "It appears that plaintiff could not discover the defect in the ladder by an ordinary inspection or such as he could have made in the use of it; but the railroad company knew of its defectiveness and that it was not suitable for the use to which it was to be applied. It must, therefore, answer for the resultant damage. *Stark v. Cooperage Co.,* 127 Wis., 322."

If notified, it was the duty of defendant in the exercise of ordinary care to remedy the defect; or if in the exercise of ordinary care by inspection the defendant could have discovered the defect, it was defendant's duty to remedy it. A failure of duty in either respect, if the proximate cause of the injury, cast liability on the defendant.

The evidence was sufficient to submit both aspects to the jury. There was evidence to the effect that defendant, in the exercise of ordinary care, by inspection could have discovered the defective condition and did not remedy it. This aspect was properly submitted to the jury. Conceding, but not deciding that the first aspect, although construing it with the entire charge was not in technical legal parlance, yet, taking the whole charge together, we cannot hold it reversible error. Defendant put in plaintiff's hands an appliance operated by electric current. This powerful agency, when not properly confined and guarded, is dangerous and deadly. "It passes unseen, unheard, odorless and without any warning of its danger." It is said in *Mitchell v. Electric Co.,* 129 N. C., at p. 169: "In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." The undisputed evidence was that plaintiff's helper was shocked by an electric current which caused him and the drill to fall on the plaintiff. The employer had control and management of the appliance that was furnished the employee. The electric current that shocked was some evidence of the defect, that the defendant by the exercise of ordinary care by inspection knew or ought to have known, sufficient to make a case of prima facie negligence. The principle of *res ipsa loquitur* applies. *Houston v. Traction Co.,* 155 N. C., 4; *Ridge v. R. R.,* 167 N. C., at p. 518; *Dunn v. Lumber Co.,* 172 N. C., 129; *White v. Hines,* 182 N. C., 275; *Modlin v. Simmons,* 183 N. C., 63; *Hinnant v. Power Co.,* 187 N. C., 292; *McAllister v. Pryor, supra.* "The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself.

It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer." Sh. and Redf. on Negl., sec. 59. *Shaw v. Public Service Corp.*, 168 N. C., p. 618.

In *Ramsey v. Power Co.*, 195 N. C., at p. 791, it is said: "The deceased was in charge of the washing machine; he had gone into the house and had returned when a colored woman told him the motor was smoking. He took hold of the switch with his right hand, said 'Lord have mercy,' quivered, shook, caught the wire with his left hand, 'crumpled up against the washing machine,' and instantly died. These circumstances, if accepted by the jury, were sufficient to make a case of prima facie negligence against the Power Company, subject of course to any explanation it should make, or in the absence of explanation to the hazard of an adverse verdict," citing cases.

As to the next objection of defendant, as to the evidence that shortly before plaintiff was injured and at a remoter period, defendant was notified of the defect by others being shocked by the same appliance that caused plaintiff's injury, we think this evidence relevant and competent.

"Injuries to others in defendant's employ, or other accidents resulting in such injuries, are admissible, if they have any tendency to prove the issue and if there is a substantial similarity in the essential conditions. Such evidence has been held admissible to prove the cause of the accident, the defective or dangerous condition, and defendant's knowledge of or duty to know such condition, and his failure to use the care required under the circumstances. If the relevancy of the evidence or similarity of conditions is not shown, the evidence is not admissible." 39 C. J., at p. 1023, part sec. 1233. See *Dorsett v. Mfg. Co.*, 131 N. C., 262; *Leathers v. Tob. Co.*, 144 N. C., p. 330; *Russ v. Harper*, 156 N. C., p. 444; *Deligny v. Furniture Co.*, 170 N. C., p. 189.

The last material assignment of error is to the charge of the court below: "He is entitled to recover a fair compensation for past and prospective losses resulting from the defendant's wrongful and negligent act and these may embrace loss of time, loss from inability to perform physical labor or capacity to earn money and for actual suffering of body and mind which are the immediate and necessary consequences of the injury complained of and which were caused by the negligence of the defendant, the burden being upon the plaintiff to satisfy you by evidence that the injury was caused by the negligence of the defendant and that such negligence was the proximate cause of his injury. (E) He is entitled to recover nothing by way of punishment. In considering what is a just compensation for substantive damages, if you should find he has been permanently injured, you have a right to consider his reduced capacity to earn a living and if you should find his capacity has been reduced in consequence of the injury and in considering it, you have the right to consider his expectancy of life, and having determined what the expectancy is, he would be entitled to recover the present net value of the difference between what he would have earned and what he is able to earn in his present condition (F)." The assignment of error is to the charge between "E" and "F." There was some evidence of a permanent injury which warranted the charge of the court below on that aspect. We think the entire charge is borne out by the authorities in this jurisdiction. *Wallace v. R. R.,* 104 N. C., p. 451; *Rushing v. R. R.,* 149 N. C., 158; *Fry v. R. R.,* 159 N. C., at 362; *Murphy v. Lumber Co.,* 186 N. C., 746; *Shipp v. Stage Lines,* 192 N. C., 475; *Inge v. R. R.,* 192 N. C., 522.

If the defendant desired fuller instruction, or in any special way, it should have asked for an instruction sufficient to present its view or so as to direct the attention and consideration of the jury more pointedly to that particular phase of damage which defendant desired to present. *Murphy v. Lumber Co., supra; Dulin v. Henderson-Gilmer Co.,* 192 N. C., 638.

As to the other assignments of error, we can find no new or novel proposition of law or any error committed by the court below. The whole case indicates that the able and learned judge in the court below tried the case with much care. We find in law

No error.

HERBERT WESLEY COVINGTON, BY HIS NEXT FRIEND, HERBERT COVINGTON v. DR. WORTHAM WYATT.

(Filed 12 December, 1928.)

1. **Physicians and Surgeons—Liability for Injuries to Patients.**

The statute requiring a physician or midwife attendant upon childbirth to instill into the eyes of the newborn baby drops of a one per cent solution of silver nitrate does not impose upon the physician attempting in good faith to obey the statute the absolute duty of ascertaining the percentage of the solution furnished by a hospital for this purpose, and he is not liable for damages resulting from the use of a larger per cent of such solution when so furnished by the hospital. C. S., 7182.

2. Same—Negligence.

Where a nurse furnished by a hospital takes a bottle of silver nitrate from the medicine chest of the hospital, the label on which is illegible as to the strength of the solution, and instills drops of this solution into the eyes of a newborn baby while attempting to comply with the statute requiring that a one per cent solution of silver nitrate be used for this purpose, the physician in charge is not liable in damages for the injury resulting from the fact that the solution used was stronger than the one prescribed by the State Board of Health, since the statute does not impose upon him the duty of analyzing the solution furnished by the hospital, and his neglect to analyze the solution is not negligence.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Lyon, J.*, at September Term, 1928, of FORSYTH. Affirmed.

The complaint states two causes of action. In the first the material allegations are that the plaintiff was born at the Baptist Hospital in the city of Winston-Salem on 18 August, 1927; that the defendant had previously been employed to attend the delivery and to give the plaintiff such care and treatment as the law requires and such as were necessary or advisable; that the defendant took charge and control of the case and assumed responsibility for performing the usual and ordinary duties within the scope of his employment; that he was required by law to instill or have instilled in the eyes of the plaintiff immediately upon his birth, two drops of a one per cent solution of silver nitrate prescribed or furnished by the State Board of Health; that he instilled a solution of more than one per cent of silver nitrate, namely thirty per cent, which the Baptist Hospital furnished; that the use of the solution administered was calculated to cause injury, and that it did cause injury to the plaintiff's eyes by burning them, causing them to swell, discoloring one eye, and impairing the plaintiff's sight.

The second cause of action has the following additional allegations: That the State Board of Health would have given to the defendant a one per cent solution of silver nitrate and that the defendant was negligent in failing to instill or have instilled into the plaintiff's eyes the solution prescribed by the State Board; that he was negligent in using a solution taken from a bottle the contents of which were unknown to him; and that the plaintiff's eyes were injured as a result of the defendant's negligence.

The defendant filed an answer denying all the material allegations of the complaint.

At the trial the plaintiff offered and thereby adopted as his evidence the following parts of paragraphs 8 and 9 of the defendant's answer: "That the mother of said child had entered the Baptist Hospital at Winston-Salem, N. C., as a patient in its maternity ward, said hospital being equipped and holding itself out as equipped to properly take care of such patients and to supply competent nurses, the required medicines and other services; that there was in attendance upon the mother of said child, to render such assistance to the defendant as might be reasonably and properly required, a competent and experienced nurse, an employee of said hospital, and after the delivery of the said child and upon the request of the defendant to procure the proper solution, said nurse went to a cabinet where only appliances and medicines for use in obstetrical cases were kept, including proper solution of silver nitrate, and said nurse, in a medicine dropper, secured from a bottle found in said cabinet and labeled "silver nitrate" a sufficient quantity thereof and brought the medicine dropper with the solution in it to the place where said child was, and while the defendant held open the eyelids of said child, the nurse placed therein the solution which she had obtained as aforesaid. He admits that the solution procured by said nurse and used by her was more than one per cent. . . . He admits that the solution used by the nurse aforesaid was approximately thirty per cent and that it was too strong for such use in the eyes of a newborn infant."

Testimony was offered by each party and at the conclusion of all the evidence the action was dismissed as in case of nonsuit. The plaintiff excepted to the judgment and appealed upon error assigned.

Ratcliff, Hudson & Ferrell for plaintiff.
Manly, Hendren & Womble for defendant.

ADAMS, J. The ground of the relief sought by the plaintiff is the defendant's disregard of certain statutes, alleged to be mandatory, contained in chapter 118, Art. 14, of Consolidated Statutes. This article, entitled "Inflammation of Eyes of Newborn," is a transcript of the Public Laws 1917, ch. 257. Such "inflammation" is defined in C. S., 7180; and in section 7181 it is provided that any person attendant on or in any way assisting an infant or the mother of an infant at childbirth, or at any time within two weeks after childbirth, knowing the condition, shall make report thereof to the local health officer. Section 7182 declares it unlawful for any physician or midwife practicing midwifery to neglect or otherwise fail to instill or have instilled into the eyes of a newborn babe, immediately upon its birth, two drops of a solution prescribed or furnished by the State Board of Health. The solution prescribed contains one per cent of silver nitrate. The duties of the local health officer and of the State Board of Health are set forth in sections 7183 and 7184. Section 7185, deals with the treatment of patients in hospitals and institutions: "It shall be the duty of physicians, midwives, or other persons in attendance upon a case of childbirth in a maternity home, hospital, public or charitable institution, in every infant's eyes, within two hours after birth, to use the prophylactic against inflammation of the eyes of the newborn specified in this article, and to make record of the prophylactic used. It shall be the duty of such institution to maintain such records in cases of inflammation of the eyes of the newborn as the State Board of Health shall direct." The next section is 7186: "Whoever, being a physician, surgeon, midwife, obstetrician, nurse, manager, or person in charge of a maternity home or hospital, parent, relative, or person attendant upon or assisting at the birth of any infant, violates any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than ten dollars nor more than fifty dollars, and, if possessed of the required amount of property, subject to suit by the parent or guardian of the child for damages resulting to the child; and if such a suit shall be brought the establishment of the fact that the physician or midwife did not place the drops in the child's eyes within two hours of its birth shall be accepted as prima facie evidence of the physician's or midwife's responsibility for the injury of the disease to the eye or eyes of the child. It shall be the duty of the prosecuting attorney to prosecute all violations of this article."

It is the plaintiff's contention that in their application to the evidence these statutes impose liability upon the defendant without regard to the question of his negligence—that is, that the defendant's duty was absolute; and as a counter argument the defendant urges the interpretation that his duty was not absolute but relative, and that neither the letter nor the spirit of the statutes authorizes a civil action for damages resulting from an effort to obey the law. The several provisions relied on by the respective parties may be considered in the light of these contentions.

The statutes contemplate diverse contingencies. As we construe them, some of the provisions impose duties in cases of childbirth in the maternity ward of a hospital; others impose duties when the birth occurs elsewhere. It would seem that the latter class of cases is within the purview of section 7182. It was developed by the testimony of the plaintiff's witnesses that the purpose of instilling the solution is to provide against the possibility of venereal infection in the parent or to destroy germs which, due to such infection, may get into the eyes of the child. The primary object is the prevention of blindness and disease of the eyes. If the physician neglects or otherwise fails to instill or to have instilled the proper solution into the eyes of the child immediately upon its birth, and blindness or a diseased condition of the eyes by reason of such neglect or failure results from the cause which the instillation was intended to prevent he may be liable in damages. The duty of trying to comply with the statutes may be absolute; but this is not equivalent to saying that the statute imposes upon a physician the absolute and unqualified duty of seeing that the solution contains exactly one per cent of silver nitrate. In practical effect the duty, if held to be absolute in this sense, would require of the physician the necessity in every case of preparing his own solution or of analyzing that which should be procured from the most competent and reputable sources. This, evidently, is not the object of the law.

The unlawful act denounced in section 7182, is the delinquency of the physician or midwife; but in section 7185, a duty is prescribed, not only for them, but for other persons in attendance upon childbirth in a maternity home or hospital. By section 7186 any physician, . . . nurse, . . . or other person attendant upon or assisting at the birth of an infant who violates the provisions of Article 14 shall be deemed guilty of a misdemeanor and may be subject to a suit for damages. In the last two sections the prescribed duty is required indiscriminately of the physician, the nurse, and others. But the duty is no more absolute here than under section 7182, the word "absolute" signifying certainty in administering the precise solution prescribed by the State Board of Health. If the prescribed duty is not absolute in its terms liability in damages will not necessarily be inferred from failure to instill the prescribed solution where an effort is made in good faith to comply with the statutes. For these reasons the judgment dismissing the first cause of action is affirmed.

The second cause is based upon the doctrine of negligence or malpractice. The allegations are that the plaintiff's injury was caused by the defendant's negligent failure to use the prescribed solution and by his substitution therefor of a solution containing a larger percentage of silver nitrate. But the plaintiff contends that without regard to the usual standard of the prudent man the violation of a statute is a wrong which becomes actionable when there is established the essential element of proximate cause. After reviewing apparent discrepancies in some of our decisions the Court held in *Ledbetter's case* that the failure, without legal excuse, to obey the provisions of a statute or ordinance imposing a public duty is negligence, which, if the efficient cause of an injury, entitles the plaintiff to recover. *Ledbetter v. English,* 166 N. C., 125. This familiar principle has been recognized in a number of subsequent decisions. *Zagier v. Express Co.,* 171 N. C., 692; *Stone v. Texas Co.,* 180 N. C., 546; *Albritton v. Hill,* 190 N. C., 429; *Gillis v. Transit Corporation,* 193 N. C., 346; *Peters v. Tea Co.,* 194 N. C., 172. In our view of the case it is not necessary to go into a minute discussion of the rationale of proximate cause. We may grant that under these and other cases if the duty enjoined by the statutes were absolute or unqualified in the sense given above and the defendant's breach of the statutes were proved or admitted as the proximate cause of the injury, the principle advanced would be available to the plaintiff; but, as we have said, the duty is not absolute, as in the cited cases. In these circumstances the specific question is whether the defendant is liable in damages under the general principles pertaining to malpractice.

Ordinarily the engagement of a physician who undertakes to treat a patient implies (1) that he possesses the degree of learning, skill, and ability requisite to the practice of his profession, (2) that he will exercise ordinary and reasonable care in the application of his knowledge and skill, and (3) that he will use his best judgment in the treatment and care of his patient. *Brewer v. Ring,* 177 N. C., 476; *Thornburg v. Long,* 178 N. C., 589; *Nash v. Royster,* 189 N. C., 408.

Whether the defendant's conduct measured up to this standard of duty becomes material only in case the responsibility of providing the prescribed solution devolved upon him; and in determining the latter point we must return to the evidence.

At the suggestion of the defendant the plaintiff's mother went to a hospital of her own selection, the physician's bill and the hospital's bill being entirely distinct. She was attended by a graduate nurse (employed by the hospital) who had served in hospitals in Greenwich, Newark, and Atlantic City. In the Baptist Hospital were maternity wards, and rooms into which newborn infants were taken. The plaintiff was in a room of the latter class, in which were the medicine cabinet, the instrument cabinet, supply closets, and a table supporting the bassinet in which the infant lay. The nurse was engaged in the usual course of her business in the hospital; she had not been selected or employed by the defendant. She inquired of him whether she should put the drops into the baby's eyes, and receiving an affirmative answer she went to the medicine cabinet and took out a bottle labeled "silver nitrate." The percentage was illegible. Knowing that a solution of only one per cent was usually kept there she filled a dropper with the stronger solution unfortunately and instilled it while the defendant held open the infant's eyes. It is shown by the plaintiff's evidence that according to the practice prevailing among physicians of good reputation before and since the statutes referred to were enacted the solution is frequently, and in fact is usually, instilled by the nurse.

It is to be borne in mind that the solution was kept by the hospital in a medicine cabinet for convenient use; it was under the control of the hospital; under control of the nurse. Authority to administer it was given the nurse equally with the physician. It is contended that the defendant was free either to discharge the imposed duty himself or leave it to be discharged by the nurse; that he left it to her; and that he was absolved from responsibility. Without a definite decision of this question it may be observed that as the hospital undertook to furnish a nurse for the mother, and medicines, appliances and instruments, there is no evidence which discloses such culpability or malpractice on the part of the defendant as should subject him to liability in damages. It follows that there was no error in dismissing the second cause of action.

There are several exceptions to the testimony, but in their application to evidence which was material and relevant to the questions involved they are untenable and must be overruled. Judgment

Affirmed.

IN RE WILL OF T. A. GROCE.

(Filed 12 December, 1928.)

1. **Wills—Requisites and Validity—Holographic Wills.**

A paper-writing written in full in the testator's handwriting and signed by him, showing *animus testandi*, and found after his death among his valuable papers is valid as his holograph will.

2. **Same—Handwriting of Testator—Evidence.**

Where the only evidence as to the handwriting of the testator is the testimony of two witnesses that the paper-writing is in the handwriting of the testator, and upon cross-examination their testimony thereon is uncontradicted, but their credibility is attacked, their evidence is sufficient to take the case to the jury, their credibility being for its determination.

3. **Same—Found With Valuable Papers.**

The requirements of C. S., 4131, that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient, and under the facts of this case the paper-writing was adjudged to be effective as his will when found after his death in the pockets of the clothes he was wearing, with large sums of money and other papers of value.

APPEAL by caveators from *Schenck, J.*, at May Term, 1928, of YADKIN. No error.

Proceeding for probate, in solemn form, of paper-writing propounded as the holograph will of T. A. Groce, deceased.

Caveators, sons of deceased, allege that the execution of said paper-writing was procured by fraud and undue influence; and that the said T. A. Groce, at the date of its execution, did not have mental capacity sufficient to make a will. They also contend that said paper-writing is not in the hand-writing of T. A. Groce, and that same was not found among the valuable papers and effects of deceased.

The issue submitted to the jury was answered as follows:

"Was the paper-writing dated 2 February, 1928, and offered for probate, and every part thereof, the last will and testament of T. A. Groce, deceased? Answer: Yes."

From judgment on the verdict, caveators appealed to the Supreme Court.

F. W. Hanes and Williams & Reavis for propounder.
Benbow, Hall & Benbow and E. M. Whitman for caveators.

CONNOR, J. T. A. Groce died at the home of a neighbor, in Yadkin County, North Carolina, on 2 February, 1928. He lived about a half-mile from the home of this neighbor. He had stopped, for a short visit, at his neighbor's home, while returning to his own home from a rural mailbox, where he had gone to mail letters to his sons. While there, engaged in conversation, he became ill, suddenly, and died almost immediately. After his death, and before his body was removed from the place where he died, in the presence of his sons, caveators in this proceeding, and of friends, who had been notified of his death, an envelope was taken from one of his coat pockets. In this envelope, which was not sealed, was found a paper-writing, dated 2 February, 1928, which is in form a will, and to which his name is subscribed.

This paper-writing purports to be the will of T. A. Groce, by which he devises to his adopted son, Floyd T. Groce, seventy-five acres of land, "where the said Floyd T. Groce may choose to take it." He bequeaths and devises the remainder of his property, real and personal, to his two sons, D. R. Groce and Albert Groce, and directs that Floyd T. Groce shall pay his debts and funeral expenses, including a tombstone.

This paper-writing has been probated, in common form, as the last will and testament of T. A. Groce. A caveat was filed to said probate by D. R. Groce and Albert Groce, sons of the deceased.

At the trial of the issue submitted to the jury, more than three witnesses testified that said paper-writing and every part thereof, including the signature subscribed thereto, is in the handwriting of T. A. Groce.

There was no evidence to the contrary. There was evidence tending to show that each of these witnesses is credible. Their testimony on cross-examination did not contradict their testimony on their direct examination, nor did it tend to affect its probative value as evidence. At most, it tended to affect the credibility of the witnesses, only. The jury was properly instructed that if they found the facts to be as these witnesses testified, they would find that the paper-writing, and every part thereof, including the signature subscribed thereto, is in the handwriting of T. A. Groce.

All the evidence tended to show that the paper-writing offered for probate was found in the envelope which was taken from a pocket of the coat which deceased was wearing, when he died. There was also found in the pockets of his coat and of his overalls money in the sum of $1,499.92; also two pencils, a pocket-knife, specks, some receipts, etc. The money was found in the pockets of his overalls; it was mostly in bills, although there were three gold pieces, of the value of forty dollars.

The evidence tended to show that deceased was an old man, and that he and his wife had lived separate and apart for many years. He lived alone. A trunk was found in his house. This trunk was locked, and in it were found, after his death, deeds, receipts and other papers of no present pecuniary value. There was also in said trunk a bank book, showing that deceased had withdrawn from the Wachovia Bank & Trust Company, on 6 May, 1927, the sum of $1,184.22. There was also evidence tending to show that deceased had said, after the withdrawal of said money from the bank, that he would not put his money in a bank, for if he did so, he would have to pay a tax on it. Deceased had also said, a short time before his death, to a neighbor, that "a man could make a will, and not have witnesses. He could put it with his papers and the neighbors could swear to his handwriting." There was evidence tending to show that deceased was often away from his home, and that in his absence, no one was there.

The evidence, if all the testimony of the witnesses was accepted as true, was sufficient for the jury to find therefrom that the paper-writing offered for probate was found among the valuable papers and effects of the deceased, in accordance with the requirement of the statute. C. S., 4131. To hold otherwise, would require a construction of the statute which would lose sight of the purpose of its provision with respect to the finding of a paper-writing offered for probate as a holograph will. This provision has been frequently construed by this Court, and always with a view of effectuating its purpose. *Rodman, J.*, in *Winstead v. Bowman,* 68 N. C., 170, says: "The phrase cannot have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased, in respect to keeping valuable papers, and the place and the circumstances under which the script was executed, viz.: whether at home, or on a journey, etc."

While the decision in *Little v. Lockman*, 49 N. C., 494, relied upon by appellant, upon the facts of that case, has not been questioned, the Court has criticized the narrow rule there laid down. *Clark, J.,* in *In re Shepard's Will,* 128 N. C., 54, 38 S. E., 27, says: "In *Winstead v. Bowman,* 68 N. C., 170, the Court criticized, if it did not overrule, the narrow rule which had been laid down in *Little v. Lockman,* 49 N. C., 494." He says, further, "the script here propounded was written in a book, which itself contained valuable papers. The testator's conduct as to this book, his calling for it, when his deeds and other books of account, which he had always kept by him in reach, were moved out of his room during his last illness, and his retention of it in his immediate custody and possession, were circumstances which the propounders were entitled to have passed upon by the jury, to say the least." See, also, as tending to sustain a liberal rather than a narrow construction of the statute: *In re Westfeldt Will,* 188 N. C., 702, 125 S. E., 531; *Cornelius v. Brawley,* 109 N. C., 542, 14 S. E., 78; *Hughes v. Smith,* 64 N. C., 493; *Hill v. Bell,* 61 N. C., 122.

In the instant case, all the evidence tended to show not only that the paper-writing, propounded as the will of T. A. Groce, deceased, including the signature subscribed thereto, was in his handwriting, but also that said paper-writing was found, after his death, among his papers and effects, which were valuable, and which he regarded as valuable. The fact that these papers and effects were in his pockets, and thus in his immediate custody, is immaterial. The statute, in this respect, requires only that the paper-writing offered for probate as a holograph will shall be found "among the valuable papers and effects of the deceased." There is no requirement as to the place where the paper-writing, and the valuable papers and effects, shall be found. The place where the papers and effects of deceased, including the paper-writing offered for probate, are found, after his death, is material, only upon the question as to whether or not such papers and effects are, and were considered by the deceased as valuable. The purpose of the statute is effectuated when the paper-writing propounded as a will is identified as the will of the deceased, by the fact that it is in his handwriting, and when his intent that it shall take effect as his will is shown by the fact that he kept it among papers and effects which he regarded as valuable, and which, in fact, were valuable.

There is no contention that there was any evidence tending to show that the execution of the will was procured by fraud or undue influence, or that T. A. Groce did not have mental capacity sufficient to make a will on the day of his death, to wit, 2 February, 1928. All the evidence is to the contrary. The judgment is affirmed.

No error.

G. A. GIVENS v. SAVONA MANUFACTURING COMPANY, ALFRED JEPSON AND JOHN T. STILES.

(Filed 12 December, 1928.)

1. **Removal of Causes—Proceedings to Procure Removal—Jurisdiction.**

   Where the complaint in an action for damages alleges a joint *tort* of a nonresident defendant and resident defendants, upon a proper petition for the removal of the cause to the Federal Court and bond filed in the court of this State by the nonresident defendant, the State Court has jurisdiction to retain the cause upon the question of fraudulent joinder of the resident defendants to defeat the jurisdiction of the Federal Court.

2. **Removal of Causes — Citizenship — Separable Controversies — Joint Torts.**

   An action against a nonresident manufacturing company and its superintendent and foreman, brought by the employee who alleges, with particularity, acts of negligence against each defendant in failing to provide him a safe place in which to work, ordering him to continue to work under dangerous conditions known to them, and in not instructing him how to do the work required of him in a manner to avoid the danger: *Held,* the record discloses allegations of a joint *tort* against each of the defendants and the State Court will retain the cause upon the petition of the nonresident to remove it to the Federal Court. *Cox v. Lumber Co.,* 193 N. C., 28; *Johnson v. Lumber Co.,* 189 N. C., 81, cited and distinguished.

APPEAL by defendant, Savona Manufacturing Company, from order of *Harding, J.,* dated 30 July, 1928. From MECKLENBURG. Affirmed.

The above entitled action was heard upon defendant's appeal from an order of the clerk, denying defendant's motion for the removal of the action from the Superior Court of Mecklenburg County to the United States District Court for the Western District of North Carolina, for trial. The petition, upon which this motion was made, was duly filed, as provided by statute.

From the order of the judge, affirming the order of the clerk, and denying its motion, defendant appealed to the Supreme Court.

Marvin L. Ritch, T. L. Kirkpatrick and B. G. Watkins for plaintiff.
John M. Robinson for defendant.

CONNOR, J. This action was begun, and was pending, on 18 May, 1928, in the Superior Court of Mecklenburg County. Upon the cause of action alleged in his complaint, plaintiff demands judgment that he recover of defendants, as damages for personal injuries, caused by their negligence, a sum of money largely in excess of $3,000.00.

On 18 May, 1928, defendant, Savona Manufacturing Company, filed its petition with the clerk of said court, praying that the action be removed from said court to the United States District Court for the Western District of North Carolina, for trial. This petition was filed, and the motion in accordance with its prayer made, after a full and strict compliance with the provisions of the statutes relative to the removal of causes from a State Court to a Federal Court. Jud. Code, sec. 29, 3 C. S., 913(b).

Defendant, Savona Manufacturing Company, is a corporation, organized and existing under the laws of the State of New Jersey; it owns and operates a cotton factory in North Carolina. Its codefendants, Alfred Jepson and John T. Stiles, are residents of the State of North Carolina. The former is employed as superintendent of, and the latter as a foreman in, the cotton factory owned and operated by the Savona Manufacturing Company. At the date of his injuries, plaintiff was an employee of the Savona Manufacturing Company, and as such employee he was required to work in said factory under the supervision and subject to the orders of said superintendent and foreman.

In his complaint, plaintiff alleges that he was injured, as set out therein, while at work as an employee of defendant, Savona Manufacturing Company, under the supervision and subject to the orders of the defendants, Alfred Jepson and John T. Stiles, superintendent and foreman, respectively, of their codefendant, and that the proximate cause of his injuries was the negligence of said defendants (1) in failing to exercise due care to provide for him a reasonably safe place to work; (2) in ordering and requiring him to work in such place, when defendants, and each of them, knew that it was not at the time a reasonably safe place; and (3) in failing to instruct him with respect to the dangers incident to the work which he was ordered and directed by defendants to do, and also with respect to the manner in which such work should be done so as to avoid such dangers. The facts alleged in the complaint as constituting actionable negligence on the part of defendants and each of them, are set out in the complaint, specifically, with great detail, and much particularity. These facts constitute a cause of action upon which defendants are jointly liable to plaintiff; the action is, therefore, not removable, upon petition of the nonresident defendant, on the ground of its separability as to each defendant. Plaintiff has elected to state his cause of action, in his complaint against defendants, as joint *tort-feasors;* the allegations of the complaint are controlling upon the question as to whether the cause of action is joint or several. *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238.

In its petition for removal of the action from the State Court to the Federal Court, for trial, the Savona Manufacturing Company alleges:

"5. That the plaintiff has wrongfully and fraudulently joined as codefendants with your petitioner, the defendants, Alfred Jepson and John T. Stiles, who are immaterial, unnecessary and improper parties to this controversy, and that the controversy is wholly between the plaintiff and this petitioner, for whom the plaintiff was working as an employee at the time of his injury; and that this controversy, and every issue of law and fact therein is one solely between citizens of different states, to wit, between the plaintiff, a citizen and resident of the State of North Carolina, as hereinbefore stated, and this defendant, a citizen and resident of the State of New Jersey, and a nonresident of the State of North Carolina."

Petitioner further alleges, after setting out the facts in detail, and with much particularity, that "as hereinbefore stated, the plaintiff, at the time and on the occasion in question, was not working under the direct orders or instructions either of the defendant Jepson, or of the defendant Stiles, and that neither of them was in any way responsible for any injury the plaintiff may have received on the occasion in question, and your petitioner avers that the plaintiff has wrongfully and fraudulently included in his complaint allegations of negligence against said individual defendants, and has wrongfully and fraudulently joined said individual defendants with your petitioner for the sole and fraudulent purpose of preventing a removal to the Federal Court which has rightful jurisdiction over this controversy, and that this controversy can be fully tried out between plaintiff and this petitioner without the presence of said individual defendants."

The principles of law, upon which a motion for the removal of an action pending in a State Court, from said court to a Federal Court, for trial, upon the ground of a fraudulent joinder of resident defendants with a nonresident defendant, for the fraudulent purpose of preventing such removal, must be allowed or denied by the State Court, are well settled. Authoritative decisions of this Court, as well as of courts of other jurisdictions, both State and Federal, with which our decisions are in full accord, are cited and reviewed in the opinion of *Stacy, C. J.*, in *Crisp v. Fibre Co., supra.* It is there declared as our holding, upon this question:

"That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584, 96 S. E., 48."

Upon the application of this principle to the facts alleged in the petition and also in the complaint, and thus appearing on the record in the instant case, we conclude that there was no error in denying defendant's motion for removal upon its petition in this action.

We think the facts appearing on the face of the record herein, readily distinguish the instant case from *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254, and from *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165. Appellant, in its brief filed in this Court, relies upon both of these cases to sustain its contention that there was error in the refusal of the court below to allow its motion for removal.

In neither of these cases was the foreman, under whose orders the plaintiff therein was required to work, present at the time plaintiff was injured; nor did it appear on the face of the record, in either case, that the foreman had failed to instruct plaintiff as to the dangers incident to his work, or as to the manner of doing his work so as to avoid such dangers; it did not appear that the foreman had given plaintiff any specific order with respect to the work which plaintiff was directed by him to do. In neither of these cases did it appear that the foreman or vice-principal of the employer owed any duty to the plaintiff, the breach of which was the proximate cause of his injuries. It was held in those cases that the fact that plaintiff had joined as a defendant one who, upon the face of the record, was not liable to him, showed that such joinder was fraudulent and made with a fraudulent purpose to prevent a removal from the State Court to the Federal Court.

In the instant case, upon the face of the record, the resident defendants are liable to plaintiff. They failed to perform duties which they owed to him. They owed to him the duty to instruct him as to the dangers incident to the work which he was required to do and as to the manner of doing this work so as to avoid these dangers. They owed to him the duty not to order and direct him to work at a place which they knew was not reasonably safe. They owed him the duty, while he was at work at a place which would become unsafe, under certain conditions, to exercise due care to prevent the happening of these conditions. It appears upon the face of the record that the breach of these duties was the proximate cause of plaintiff's injuries. The resident defendants, upon the facts appearing on the face of the record are liable to plaintiff. The fact that they were not present at the time of the injury, giving to plaintiff specific orders with respect to his work, does not relieve them of liability. Plaintiff was at work under their orders, at a place which they knew was dangerous, under conditions then existing, which they could have prevented by the exercise of due care for the safety of plaintiff.

Our decision in this case is sustained by the decision in *Swain v. Cooperage Co.,* 189 N. C., 528, 127 S. E., 538. Upon the facts appearing on the record in that case, it was held that the superintendent of defendant company was liable to plaintiff, and that there was error in the refusal of the motion to remove, upon the ground of fraudulent joinder.

Where an employer is liable to an employee for damages caused by negligence arising from the breach of a nondelegable duty, the vice-principal of the employer, under whose orders the employee was at work at the time he was injured, may or may not be personally liable to the employee. His liability must be determined by the facts of the particular case. We need not now discuss or decide the interesting question as to when or under what circumstances he may be held personally liable. Upon the facts of the instant case, both the superintendent of and the foreman in, the factory owned and operated by defendant, Savona Manufacturing Company, are liable to plaintiff. There was no error in refusing the motion for removal. The order affirming the order of the clerk and denying appellant's motion is

Affirmed.

F. B. INGLE v. GAY GREEN.

(Filed 12 December, 1928.)

Contracts—Construction and Operation—Conditions.

Where the plaintiff alleges a contract for the division of profits to be derived from the sale of certain real estate provided a satisfactory sale was made within twelve months from the date of the contract, and alleges that he produced purchasers for the land, but that none of the offers was satisfactory to the defendant, and there is no allegation of fraud or arbitrary refusal to sell: *Held,* evidence sustaining these contentions was properly nonsuited.

APPEAL by plaintiff from *McElroy, J.*, at March Term, 1928, of HENDERSON.

Civil action to recover damages for an alleged breach of the following contract:

"Asheville, N. C., 14 April, 1925.

"This form of contract by and between Gay Green, party of the first part, and F. B. Ingle, party of the second part. The party of the first part purchased the T. L. Johnson farm containing 150 acres for $16,000.00, through the party of the second part with the understanding that both parties hereto are to share all profits equally above the purchase price of $16,000.00, and each party are to bear equally in all expense of handling and selling said farm. Provided a satisfactory sale can be made within twelve months from date.

GAY GREEN,
F. B. INGLE."

The proviso, or last sentence, in this contract was inserted by the defendant in his own handwriting. It is conceded that no sale was made within the life of the contract, though plaintiff alleges he produced purchasers ready, able and willing to buy before the expiration of the twelve month's period. But none of the offers was satisfactory to the defendant. There is no allegation that defendant acted fraudulently or arbitrarily in refusing to sell.

Arledge, Taylor & Crowell for plaintiff.
Alfred S. Barnard and Shipman & Arledge for defendant.

PER CURIAM. The record fails to disclose any ground upon which plaintiff is entitled to recover against the defendant in the present action.

The judgment of nonsuit was properly entered.

Affirmed.

GEORGE W. JONES v. W. G. CANDLER ET AL.

(Filed 12 December, 1928.)

1. **Appeal and Error—Record—Matters Not Set Out in Record Deemed Without Error.**
   Matters not set out in the record will be deemed to be without error on appeal.
2. **Appeal and Error—Review—Burden of Showing Error.**
   The burden of showing error on appeal is on the appellant.

APPEAL by enterer from *McElroy, J.,* at August Term, 1928, of BUNCOMBE.

Proceeding of protest under the entry laws.

From a judgment in favor of protester, the enterer, or claimant, appeals, assigning errors.

Carl W. Greene for plaintiff.

W. W. Candler and Fortune & Fortune for defendants.

PER CURIAM. George W. Jones made entry to certain lands in Buncombe County under C. S., 7554, alleging the same to be vacant and unappropriated. Protest was filed by W. G. Candler, acting on behalf of himself and as agent for the heirs of Loucinda Candler, under C. S., 7557, claiming title to the whole of the lands covered by the entry.

The enterer offered in evidence, for the purpose of attack, two grants covering the land in controversy and under which the protestants claim title thereto. It is alleged that said grants are void because not registered within twelve months, the time prescribed in each grant for its registration. But the grants are not in the record, hence we cannot say there was error in the respect imputed.

Appellant is required to show error; it is not presumed. *In re Ross*, 182 N. C., 477, 109 S. E., 365.

No error.

J. R. WINCHESTER v. C. M. BYERS.

(Filed 12 December, 1928.)

1. Waters and Water Courses—Surface Waters—Rights and Liabilities in Regard Thereto.

While the upper proprietor of lands may not divert the surface water thereon from its natural flow to the damage of the lands of the lower proprietor, the latter may not dam the water back upon the lands of the former to his damage.

2. Same—Damages.

An upper proprietor of lands may recover damages against the lower proprietor for unlawfully damming the surface flow of water back upon his lands to the time he sells and conveys his land to another, and instruction so confining the damages is proper.

3. Same—Requests for Instructions.

Where temporary damages caused by a wrongful diversion of the flow of surface water are sought in an action, an exception to a charge

generally correct as to the law arising from the evidence as to the amount of damages recoverable will not be sustained when the appellant has failed to tender prayers for instructions going into more specific detail.

APPEAL by defendant from *Harding, J.*, and a jury, at March Special Term, 1928, of MECKLENBURG. No error.

Clyde A. Duckworth for plaintiff.
Pharr & Currie for defendant.

PER CURIAM. This is an action for diverting the natural flow of surface water by defendant placing dirt in such quantities on his land that the water flooded plaintiff's land, damaging his house and land. We think the evidence sufficient to be submitted to the jury.

The principle of law is well settled in *Porter v. Durham,* 74 N. C., at p. 779: "It has been held that an owner of lower land, is obliged to receive upon it the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot however raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water, or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place, or in a different manner from its natural discharge." *Brown v. R. R.,* 165 N. C., at p. 396; *Barcliff v. R. R.,* 168 N. C., 268; *Eller v. Greensboro,* 190 N. C., at p. 720.

Taking the charge as a whole, and not disconnectedly, we think there is no reversible error. The court below charged: "(a) He (plaintiff) would be entitled to recover whatever damage he sustained to his property brought about by the wrongful acts of the defendant up to the time that he sold his property, and I believe there is evidence tending to show that that was sold in 1924. (b) If there has been a continuance of the diversion, and continuance of the flow of dirt from defendant's lot to plaintiff's lot since plaintiff sold his lot, such damage as has occurred since that time plaintiff would not be entitled to recover. The court does not intimate that anyone has a right to recover for such a damage which has occurred since that time, that is not a matter before the court." The charge was clear and plain that only temporary damage could be recovered. The exception and assignment of error is to the charge between a and b, above set out, but taking the entire part of the charge it is not prejudicial. In cases of private ownership, when the action is for temporary damage for the continuing or recurrent wrong, the recovery can be in this jurisdiction to the time of the trial. *Webb v. Chemical Co.,* 170 N. C., at p. 664. Under the facts here, the court below correctly confined the damage to the time plaintiff sold the property.

Plaintiff contended that the reasonable cost of repairing the property, total spent, was some $800. The jury's verdict was $675.00. The charge complained of as to market value was not prejudicial, as it was limited to temporary damage: "If you find that the dirt upon his premises was placed so as to keep the natural flow of water on plaintiff's land, that he had put there artificially. *Such damage* as was brought *about by those acts,* if you find they were wrongful *and no more."*

In the contentions the court below fully set forth the matter of unusual and excessive rains, and the evidence in reference to same on the part of both plaintiff and defendant. If the evidence justified a charge on unforeseen or unprecedented rain fall, no prayer was requested by defendant. Taking the entire charge, we think the prayers asked by defendant were practically given, at least so far as the law was applicable to the facts.

In the present action, private ownership was involved. An issue in such case for permanent damages may be submitted only by consent of plaintiff. No such issue was submitted, nor did the facts justify such an issue. *Morrow v. Mills,* 181 N. C., 423; *Langley v. Hosiery Mills,* 194 N. C., 644. As to the right to take private property for public purposes, a different rule prevails. *Mitchell v. Ahoskie,* 190 N. C., 235; *Eller v. Greensboro, supra; Ragan v. Thomasville, ante,* at p. 261. The distinction is readily observed, ordinarily private property cannot be taken for private purposes without the consent of the owner. For public purposes it can be taken only after payment of just compensation.

The action in the court below was tried on the theory of temporary damages. We find in the record no prejudicial or reversible error.

No error.

STATE v. WILLIAM TUTTLE, ERNEST TUTTLE AND RUFUS MERRITT.

(Filed 12 December, 1928.)

Criminal Law—Evidence—Weight and Sufficiency.

A motion for judgment as of nonsuit upon the evidence should be granted when the evidence is purely conjectural as to the identity of the defendants tried for a violation of the prohibition statute.

APPEAL by defendants, William and Ernest Tuttle, from *Deal, J.*, and a jury, at April Special Term, 1928, of STOKES. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash, for the State.

W. Reade Johnson for defendants, William and Ernest Tuttle.

PER CURIAM. The three defendants were convicted of violating the law against the manufacture, etc., of intoxicating liquors.

The defendant, Rufus Merritt, was sentenced by the court below and did not appeal. The Tuttles introduced no evidence in the court below, and at the conclusion of the State's evidence, demurred to the evidence and moved to dismiss the action or for judgment of nonsuit. C. S., 4643.

The appeal presents the sole question as to the sufficiency of the State's evidence to support the verdict. The evidence was wholly circumstantial. As to the identity of the Tuttles, it was merely suspicion and conjecture.

After a thorough and careful examination of the evidence, as appears in the record, we are of the opinion that it is not sufficient to support the verdict and judgment thereon. The judgment of the court below is

Reversed.

STATE v. HARRISON SHEW.

(Filed 12 December, 1928.)

Criminal Law—Evidence—Testimony of Convicts, Accomplices or Codefendants—Requests for Instructions.

While it is a rule of law that the evidence of a witness who is confined upon the roads for a criminal offense should be received with certain caution, the failure of the judge to so charge the jury will not be held for error in the absence of a request for instructions by the appellant to that effect.

APPEAL by defendant from *Schenck, J.*, and a jury, at March Term, 1928, of WILKES. No error.

Defendant was convicted for receiving a stolen Ford touring car knowing it to have been stolen. From the judgment he appealed to the Supreme Court, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Hubert Whicker and Trivette & Comer for defendant.

PER CURIAM. Did his Honor err in permitting Harvey Campbell, who was serving a term in the State's penitentiary for stealing automobiles to testify against the defendant, without charging the jury that the jury should scrutinize the testimony of said Campbell? We think not.

Defendant asked no prayer on the subject, it is ordinarily not incumbent on the court to charge without a request. *S. v. O'Neal,* 187 N. C., 22.

It is well settled in this jurisdiction that the uncorroborated testimony of an accomplice should be received with caution, yet there is no rule of law forbidding a conviction on his evidence alone. *S. v. Ashburn,* 187 N. C., at p. 728.

The testimony of W. W. Ashburn was positive as to the ownership of the stolen car—"that he knew that this car belonged to Miss Ora L. Beam."

We can find no error in the record.

No error.

STATE v. CLING ASHE.

(Filed 19 December, 1928.)

1. **Abduction—Elements of Crime—Adultery—Husband and Wife.**

The provisions of C. S., 4225, making it a felony for any male person to abduct or elope with the wife of another, has as an essential element adultery after the elopement.

2. **Abduction—Evidence—Circumstantial Evidence.**

In a prosecution under C. S., 4225, for the abduction of another's wife, the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt.

3. **Same—Nonsuit.**

Evidence tending to show that the defendant charged with the violation of C. S., 4225, knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury.

4. **Same—Instructions.**

Where the evidence upon the trial of one charged with violating C. S., 4225, is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time.

5. Trial—Instructions—Objections and Exceptions.

An inadvertent error in the recitation of a fact in evidence by the court in his charge to the jury should be called to his attention at the time by the excepting party.

APPEAL by defendant from *Moore, J.*, and a jury, at July Term, 1928, of HAYWOOD. No error.

It was in evidence, on the part of the State, that the defendant was working in the mountains, logging with skidders, for Boice Hardwood Company. To carry on his work he had a shanty for his workmen. The prosecuting witness, Jesse Haynes, and his wife worked for defendant, Jesse Haynes peeling tan bark and his wife cooking for five or six of the workmen and defendant, and was paid by defendant. She ran the boarding house for defendant about eight months. Haynes and his wife had been married nearly four years and had two children. Defendant slept in the next shanty to defendant and his wife; that Jesse Haynes and his wife lived together and were getting along all right until defendant came and lived in the shanty; that while the hands and the husband were away during the day at their work, defendant was seen about the kitchen with Haynes' wife; that defendant gave Haynes' wife money, clothes, stockings, etc., at small cost. Haynes testified: "I was not at home when my wife left me. I don't know who she left with. I had already drawed up an idea where she was; when I heard Cling Ashe's car was at the top of the mountain I knew where the woman was. I found her at Sylva. I took out papers for Mr. Ashe. I withdrew those papers. In pursuance of my taking out those papers, I had several conversations with Cling Ashe. He told me where my wife was. He told me if I would withdraw the papers and wouldn't have him prosecuted he would show me the woman. He took me and showed me the woman. The first time I went to Sylva I had seen suspicion of wrong that had been committed between my wife and Mr. Ashe, but had not seen—did not know anything definite. . . . My wife stated to me in the presence of Cling Ashe that she wasn't going to live with me any more. When she made that statement Cling said she could stay with him as long as she wanted to. . . . Their acts and appearance made me think they had improper relations. That was all they could talk about; they seemed more perfect man and wife than me and her. . . . I was not jealous of my wife. Not a bit. I think she was a virtuous woman till the time we took the camp. After we took the camp I think she lost her virtue. I lived with her eight months after I thought that, but I thought I could save my kids and home and get it stopped. I thought my wife was having sexual intercourse with this man for eight months, and I put up with her. . . . I couldn't say who took her to Sylva. I didn't see anybody take her, but Mr. Ashe showed her to me. He said, 'You are a damned fool for coming and searching my house after I ran away with the woman; you ought to know I wouldn't have the woman here after running away with her.' Ashe told me that my wife come with him in his car from the Boice works to Waynesville."

It was in evidence that after Haynes' wife left, that defendant visited her frequently at different places; that he rode around in a car with her and others. It was in evidence that Haynes' wife was an innocent and virtuous woman. The mother of Jesse Haynes' wife, Mrs. Joe Pressnell, testified: "Saw her and Cling Ashe in the room together prior to the time she left. I saw them standing in the kitchen together. She told me she was going to leave." After her daughter left her husband, Mrs. Pressnell had a conversation with defendant: "He said I was trying to lay all the blame on him, and I asked him what he would do if it was his daughter and some old man was to come along and take her off? I said, supposing Joe Pressnell was to come and take Jim Whitehouse's wife, what would he do? I said he would be in for shooting his brains out. He didn't say anything."

There were other circumstances. The defendant's defense was largely that he was a married man, fifty-eight years old, and that he was befriending the young woman, and that he had never at any time done anything inconsistent with this attitude. The woman herself testified along this line, and that she left her husband because he was mean to her. Both testified that there were no improper relations between them.

The material assignments of error and other necessary evidence will be set forth in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. W. Ferguson, John M. Queen and Hannah & Hannah for defendant.

CLARKSON, J. Defendant was indicted for abduction of Mrs. Jesse Haynes, a married woman, under C. S., 4225, which is as follows: "If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: *Provided,* that the woman, since her marriage, has been an innocent and virtuous woman; *provided further,* that no conviction shall be had upon the unsupported testimony of any such married woman." *S. v. O'Higgins,* 178 N. C., 708; *S. v. Hopper,* 186 N. C., 405.

One of the essential elements of the offense after the elopement is adultery.

"Evidence of a crime may be circumstantial as well as direct. Prostitution is an offense usually committed in secret, and sometimes circumstantial evidence is the only kind that can be obtained. It is sufficient to show facts and circumstances from which the jury may reasonably infer guilt of the parties. *S. v. Eliason,* 91 N. C., 564. From the facts and circumstances, it is a substantial right that the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt. *S. v. Palmore,* 189 N. C., 538." *S. v. Sinodis,* 189 N. C., at p. 567; *S. v. Poteet,* 30 N. C., 23; *S. v. Austin,* 108 N. C., 780; *S. v. Chaney,* 110 N. C., 507. We think the charge of the court below gave defendant the humane rule that the jury must be satisfied of his guilt beyond a reasonable doubt.

It is competent, as a circumstance, to prove that the persons charged with having committed the offense visited places which afforded them an opportunity for the commission of the unlawful act, and in such cases evidence is admissible to show the reputation of the place. *Sutton v. State,* 124 Ga., 815; 53 S. E., 381; *Commonwealth v. Gray,* 129 Mass., 474; *S. v. Cushing,* 86 Vermont, 416, 85 Atl., 770; *Wilson v. State,* 61 Tex. Cr. App., 628, 136 S. W., 447; *Davidson v. State,* 76 Tex. Cr., 196, 173 S. W., 1037; Wigmore on Evidence (2d ed.), sec. 78; *Sparks v. State,* 59 Ala., 82; *State v. Brunell,* 29 Wis., 435; *Whitlock v. State,* 4 Ind. App., 432, 30 N. E., 934; *State v. Price,* 115 Mo. App., 656, 92 S. W., 174; *State v. Hendricks,* 15 Mont., 194, 39 Pac., 93, 48 Am. St. Rep., 665. See Michigan Law Review, December, 1928, page 216. Some of the above decisions admit evidence solely of the general reputation of the house.

We think the material exceptions and assignments of error were to evidence obtained by the State from witnesses examined in behalf of the State to the effect that the *character of Ruth Owen,* at whose house the defendant and Mrs. Jesse Haynes visited, *was bad,* and that the general reputation of Ruth Owen's *house was bad.* That after defendant was bound over to court he visited Mrs. Jesse Haynes at Ruth Owen's house, carrying with him quite a bunch of groceries; that they fixed and had dinner pretty soon. They all ate around the table, some five to six people. After the dinner, defendant and the Haynes woman went into a room. This circumstance was explained by defendant by saying "that Ruth Owen (who was Mrs. McElroy), and Mr. McElroy himself, who was sick and lying on a bed, were in the room at that time."

The court below, in reciting the evidence, said: "One witness, Mr. Leatherwood, testified he saw her at Ruth Owen's here in town, which has been testified to by the witnesses to be a house of ill fame or bad character; that he saw this woman there at Ruth Owen's and saw the defendant, Cling Ashe, go there carrying something like provisions and groceries; that they had dinner, and afterwards Cling Ashe and the woman went off in a room and shut the door." Under the facts in this case, taken in connection with the other circumstances, this circumstance was relevant—the weight was for the jury.

It may be inferred that "bad" meant "ill fame." If that was not the meaning as understood at the time, when the court below so construed it to mean "a house of ill fame or bad character," the defendant had an opportunity to correct the recital of fact, but did not do so. He cannot be heard now. *S. v. Geurukus,* 195 N. C., 642. There was no request to limit the evidence.

Then, again, "bad" is a general word. "*To the bad,* to a bad condition, implying, variously, illness (in a person), a deficit (in an account), *moral ruin,* etc." Webster's Dictionary.

It may be noted that defendant does not make the exceptions and assignments of error to the charge in accordance with the rule laid down in *Rawls v. Lupton,* 193 N. C., 428.

We think there was sufficient evidence to be submitted to the jury and, in the charge, as a whole, there was no prejudicial or reversible error.

No error.

L. C. GRUBBS v. H. A. LEWIS.

(Filed 19 December, 1928.)

Master and Servant—Liability of Master for Injuries to Servant—Tools and Appliances—Evidence.

The master is only required to exercise ordinary and reasonable care in furnishing his servant reasonably safe and suitable tools and appliances with which to perform his duties, as may be evidenced by like tools and appliances that are known, approved, and in general use, and in an action to recover damages caused by an electrically driven sausage machine, the admission of evidence of a machine used for the purpose with less danger is reversible error in the absence of evidence that it was in existence at the time, or that it was then known, approved, and in general use.

CIVIL ACTION, before *Harding, J.,* at March Term, 1928, of MECKLENBURG.

The plaintiff alleged that in March, 1917, while a minor between thirteen and fourteen years of age, he was employed to work in the meat market of the defendant. In the usual operation of his business the defendant used a sausage grinder which was operated by electricity. Plaintiff further alleged that he was directed to use this sausage grinder to grind meat, and, although a minor of tender years, was given no instructions as to how to operate said machine; that said machine was dangerous and was not provided with necessary guards and protections; that in attempting to perform the duties required of him plaintiff put his hand in said machine and was seriously and permanently injured by having the fingers and thumb of his right hand cut off. Suit was instituted on the 3d day of June, 1926, or some nine years after the injury.

The defendant denied all allegations of negligence and offered proof to support his contentions.

From judgment upon the verdict the defendant appealed.

D. E. Henderson and T. L. Kirkpatrick for plaintiff.

H. F. Seawell & Son, U. L. Spence and Manning & Manning for defendant.

BROGDEN, J. In an action for personal injury sustained in operating a machine, is it competent to show that there is a safer machine for doing the same work than the one used by the defendant at the time of the injury?

Upon the cross-examination of the defendant, Lewis, by counsel for plaintiff the witness was examined about a meat-grinding machine made by the Enterprise Machine Company, which was constructed with a higher neck and a smaller passage down the worm. Thereupon the defendant was asked the following question: "That machine is a much safer machine and less inherent to danger than this machine, is it not?" The defendant objected to the question, but the objection was overruled, and the defendant excepted. The defendant thereupon answered the question, "Yes." On redirect examination the defendant undertook to explain his answer by stating that the Enterprise machine was constructed so as to make it impossible for the operator to get his hand in the machine.

There is no allegation in the complaint that the machine used by the defendant was not approved and in general use. Furthermore, there was no evidence to such effect. The evidence in behalf of the defendant tended to show that the machine inflicting the injury upon the plaintiff was approved and in general use. The rule of liability in such cases was stated in *Marks v. Cotton Mills,* 135 N. C., 287, 47 S. E., 432, as follows: "The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use."

Again in *Deligny v. Furniture Co.,* 170 N. C., 189, 26 S. E., 980, the rule is expressed as follows: "It is also the plain duty of the master to use all machinery, appliances, tools and materials as have been approved and are generally used by those engaged in the same trade or business, which will contribute to the employee's safety, and this rule applies to all reasonable safeguards against injury to his servant." *Lloyd v. Hanes,* 126 N. C., 359, 35 S. E., 611; *Kiger v. Scales Co.,* 162 N. C., 133, 78 S. E., 76; *Steeley v. Lumber Co.,* 165 N. C., 27, 80 S. E., 963.

The evidence objected to tended to show that there was in existence a machine for grinding meat so constructed as to possess less inherent danger to the workman than the machine used by the defendant. However, the evidence does not disclose that the machine referred to had even been invented at the time plaintiff was injured, or that it was an approved appliance or in general use, or that it had ever been in general use for the purpose of grinding meat.

Under these circumstances the exception of defendant to the evidence is sustained.

There are other exceptions in the record worthy of grave consideration, but as the case must be tried again it is not deemed expedient to discuss them.

New trial.

STATE v. WALTER GIBSON.

(Filed 19 December, 1928.)

Assault—Assault With Intent to Kill—Intent—Malice—Presumptions—Deadly Weapon.

Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, C. S., 4214, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove.

APPEAL by defendant from *Moore, J.,* at July-August Term, 1928, of SWAIN.

Criminal prosecution tried upon an indictment charging the defendant with a felonious assault upon one Otis Carver, with a deadly weapon, to wit, a knife, with intent to kill, and inflicting serious injury, not resulting in death, contrary to the statute, C. S., 4214, in such cases made and provided and against the peace and dignity of the State.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison for a term of not less than two, and not more than five, years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. G. Hall, E. P. Stillwell and Moody & Moody for defendant.

STACY, C. J. It is not denied that the defendant cut the prosecuting witness with a knife, but he alleges that this was done during or following a fight in which he was thrown from the back of an automobile and rendered practically unconscious when his head struck the concrete highway, and that he did not know what took place for some time thereafter.

The court instructed the jury as follows:

"If the State has satisfied you beyond a reasonable doubt that the defendant cut the man Carver with a deadly weapon, then the burden shifts to the defendant to satisfy you that he did not know anything about this matter; that his mind was addled and that he knew nothing about it, he must satisfy you that at the time he was so unbalanced that he didn't know right from wrong, and the fact that he was voluntarily drunk and didn't know what he was doing, that would not excuse him. . . . If you further find that he knew what he was doing, you would return a verdict of guilty. If you find beyond a reasonable doubt that in the first instance the prosecuting witness was cut with the knife by this man, it being either admitted or proved that he cut Carver with a knife, that would presume malice on his part and an intent to do it; if he struck with a deadly weapon that presumes malice. If you further find that he had malice in his heart, then it would be your duty to convict him."

This charge forms the basis of one of defendant's exceptive assignments of error, and it is conceded by the Attorney-General that the instruction is erroneous in view of the decisions in *S. v. Simmerson,* 191 N. C., 614, 132 S. E., 596, and *S. v. Redditt,* 189 N. C., 176, 126 S. E., 506.

The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, on the present record, to establish a presumption of felonious intent, or intent to kill, sufficient to overcome the presumption of innocence, raised by a plea of traverse, and cast upon the defendant the burden of disproving his guilt. *S. v. Wilbourne,* 87 N. C., 529; *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756.

The case is not like an indictment for murder, where malice is presumed from the deliberate use of a deadly weapon; for there it could be said that the defendant intended the consequences of his act, but here the intent to kill, if present, was not followed by such grievous consequences. Hence, it cannot be said, as a matter of law, that the defendant intended to kill; his act fell short of that intention, and no killing occurred. The law will not ordinarily presume a murderous intent where no homicide is committed. This is a matter for the State to prove. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504; *S. v. Hill,* 181 N. C., 558, 107 S. E., 140.

For the error confessed a new trial must be awarded, and it is so ordered.

New trial.

HELEN PELTZ v. B. C. BURGESS ET AL.

(Filed 19 December, 1928.)

Boundaries—Evidence, Ascertainment, and Establishment—Reputation.

Where the location of some of the lines and boundaries of lands is sought to be established by reputation, the declarations must have their origin at a time comparatively remote, *ante litem motam,* and should attach themselves to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location, and the declarant must also have been disinterested at the time of making the declarations and dead at the time they are offered in evidence.

APPEAL by defendants from *Schenck, J.,* at July Term, 1928, of YANCEY. New trial.

R. W. Wilson and Charles Hutchins for plaintiff.
Watson, Hudgins, Watson & Fouts for defendants.

ADAMS, J. The plaintiff's purpose being to remove a cloud from the title to her land she was content with the submission of one issue, and in response thereto the jury found that she is the owner of the land in controversy. Upon the return of the verdict she was awarded a judgment from which the defendants appealed.

Several of the exceptions were taken to the admission of testimony relating to the location and the general reputation of lines and corners. We have often held that common reputation, to be admissible, should have its origin at a time comparatively remote, always *ante litem motam,* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location. Also that declarations as to boundaries are admissible when shown to have been made *ante litem motam*, the declarant being disinterested at the time they are made and dead when they are offered. *Brown v. Buchanan,* 194 N. C., 675; *Pace v. McAden,* 191 N. C., 137; *Corbett v. Hawes,* 187 N. C., 653; *Tripp v. Little,* 186 N. C., 215; *Randolph v. Roberts, ibid.,* 621; *Hoge v. Lee,* 184 N. C., 44.

In the admission of parts of the evidence these rules were not observed. It became material to establish the McD. Young line and the surveyor was asked if he knew whether a certain tree had been "known by reputation as this line." He answered, "I have always been told that was the line." And in answer to the question whether this had always been claimed by the people of the community he said, "I have been told by men who ought to know that that was the line." These answers were not responsive to the questions; and furthermore they gave the plaintiff the advantage of hearsay evidence which would have been admissible only after the witness had qualified himself to testify. True, he had previously said that there was a reputation of long standing in the community as to the McD. Young line and that he had known the line as long as he could remember. But he did not say whether the "reputation" antedated the beginning of the controversy, not of the suit *(Rollins v. Wicker,* 154 N. C., 560), and whether its "long standing" was sufficiently remote in point of law. It was held in *Bland v. Beasley,* 140 N. C., 629, that a period of seventeen years was not comparatively remote, and in *Hoge v. Lee, supra,* that a period of five or six years was insufficient. So it will be seen that the evidence excepted to was not competent under either rule—that is, the foundation had not been laid for its admission as to general reputation or as to the declarations of persons deceased.

The same principle applies to the testimony of R. L. Young. After saying that he had no knowledge of any "ancient general reputation" as to the location of the old McDowell line, he was permitted to testify that there exists a general reputation as to its location and then to designate the location. All the requirements preliminary to the admission of this evidence were overlooked.

To all this evidence the defendants excepted, and its admission entitles them to a new trial. The defendants advance other reasons for another hearing, but these we need not consider.

New trial.

STATE v. EVERETT CORRIHER.

(Filed 19 December, 1928.)

1. **Criminal Law—Evidence—Materiality and Competency in General.**

Where evidence of the defendant's commitment for lunacy is relevant upon a trial for a homicide, and he has admitted he was committed for lunacy to a State institution, the rule that the State is bound by the defendant's replies to questions as to collateral matters is not violated when within the scope of his admissions.

2. **Evidence—Expert Testimony—Competency of Experts.**

Where a witness has testified as an expert, a general exception to his testimony will not be upheld upon the ground that the court has not ruled upon the question of his qualification as an expert, when he has not been requested to do so by the objecting party.

APPEAL by defendant from *Sink, Special Judge,* at April Term, 1928, of BUNCOMBE. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Robert R. Reynolds and W. A. Sullivan for defendant.

ADAMS, J. The defendant was indicted for the murder of William Sumter Carpenter, and was convicted of murder in the second degree. He excepted to the judgment and appealed upon assignments of error.

The first assignment includes exceptions to questions asked the defendant in reference to his previous commitment to the State Hospital in Raleigh. He admitted that he had been committed to "Dix Hill," but denied that he knew anything concerning a paper purporting to be the commitment. The fact that in framing the question the prosecuting officer read the paper affords no ground for a new trial; the contents of the paper were not proved or admitted in evidence. As to the inquisition of lunacy the defendant answered, "They did not say anything to me about it." By this cross-examination no material fact was elicited which the defendant had not previously admitted, and there was no offense against the well-known rule that as to collateral matters the State was bound by the defendant's answer.

Doctor Edwards, a witness for the defendant, was asked on cross-examination whether the defendant, when under the influence of liquor, was a violent and dangerous man, but his answer was negative and could not have been prejudicial. He was then asked the following question: "If the jury should find from the evidence that the bullet entered the deceased at or near the waist-band and came out near the groin and went diagonally across through the abdomen, I will ask you to state to the jury what in your opinion was the relative position of the deceased at the time the wound was made by the pistol?" He answered, "Either standing up or bent over, not sitting down." The ground of the defendant's exception does not appear in the record, but in the brief it is said to be that the witness had not qualified as an expert. It was held in *Ramsey v. Oil Co.,* 186 N. C., 739, that an exception of this kind cannot be maintained on a general objection to the evidence when the facts show that a witness, competent as an expert, is testifying as to matters within his experience and training and that a direct finding by the court whether he is an expert should be requested. Besides this, the evidence, instead of being hostile to the defendant, tended to support his plea of self-defense. We find no error in the record.

No error.

FIRST SECURITY TRUST COMPANY, EXECUTOR OF THE WILL OF J. A. LENTZ, DECEASED, v. MRS. BLANCHE F. LENTZ, MRS. WINNIE LEE KEEVER, E. W. LENTZ, FRANK W. LENTZ, FRANCES E. LENTZ, JOHN A. LENTZ, JR., AND BLANCHE LENTZ, THE LAST TWO BEING MINORS AND REPRESENTED BY THEIR GUARDIAN, MRS. BLANCHE F. LENTZ.

(Filed 19 December, 1928.)

1. **Wills—Construction—Action to Construe Wills—Executors and Administrators.**

The executor of a will may apply to the court for an interpretation thereof.

2. **Same—Judgments.**

Where an executor has applied to the court to obtain a construction of a will with respect to the value of the parts to be taken by each of the beneficiaries, the judgment of the court, unappealed from, is to be considered by the court in a subsequent proceeding by the executor to obtain information for his guidance.

3. **Executors and Administrators—Allowance and Payment of Claims—Liabilities of Estate.**

A testator may not so dispose of his estate as to avoid the payment of his debts in accordance with the priorities fixed by statute. C. S., 93.

4. **Wills—Construction—Afterborn Children—Descent and Distribution.**

A child born after the testator has executed his will, and who is not therein mentioned or provided for, is entitled to such share and proportion of her father's estate as if he had died intestate. C. S., 4169.

5. **Executors and Administrators—Allowance and Payment of Claims—Order of Affecting Assets for Payment of Debts—Wills.**

While the law fixes the primary liability for the payment of the testator's debts upon the personal property, the testator may by the terms of his will charge specific devises or bequests with the payment of designated debts, and exempt his personal property from the primary burden of paying such debts.

6. **Same—Specific Bequests and Legacies.**

Where a testator has devised separate portions of his lands to designated children and to his wife in lieu of dower, and his business to certain of his children upon condition that they pay the indebtedness that may be outstanding against it, and also has annexed a like condition to the other specific devises and bequests, and it is made to appear that the liabilities of the business greatly exceed its assets, equity will charge payment of the debts upon the other estate left by the testator, observing the intent of the testator in regard to the apportionment to be charged against the various interests to be taken by the other beneficiaries.

7. **Same.**

Where the testator has specifically devised to certain of his children designated portions of his estate under certain conditions as to the payment of his debts, and also to his wife a life estate in certain of his other lands under like conditions in lieu of dower, and in equity both of these estates are chargeable with debts which would not otherwise be paid: *Held*, the widow stands on a parity with the others in this class, and they are entitled to equality of contribution as among themselves, which in a proceeding by the executor involving this question, he is not required to adjust.

8. **Reference—Consent Reference—Power of Judge to Modify, Set Aside, etc.**

In passing upon the report of a referee under a consent reference the judge has the authority, in the exercise of his supervisory power under the statute, to affirm, amend, modify, set aside, make additional findings, or confirm or disaffirm the report in whole or in part, and on this appeal leave is granted the parties to file additional exceptions if so advised.

APPEALS by plaintiff and defendants, Winnie Lee Keever, E. W., F. A. and Frances Lentz, from *Finley, J.,* at May Term, 1928, of CATAWBA.

Civil action brought by First Security Trust Company, executor under the will of John A. Lentz, deceased, against the devisees, legatees and afterborn child of the testator, who are making opposing demands upon the plaintiff, to secure an accounting and for guidance in the discharge of its duties as said executor.

John A. Lentz, of Catawba County, died 8 April, 1925, leaving a last will and testament in words and figures as follows, to wit:

"I, J. A. Lentz, of the city of Hickory, county of Catawba, and State of North Carolina, being of sound mind and memory, do make, publish and declare the following as and for my last will and testament:

"1. My executor hereinafter named, shall as soon as possible after my decease, make distribution of my estate, and the payment of all my just debts shall be made out of the property and in the manner hereinafter designated.

"2. I give and devise to my daughter, Mrs. Winnie Lee Keever, wife of Clarence Keever, the dwelling-house and lot on the corner of Twelfth Avenue and Fourteenth Street where she and her husband now reside, to have and to hold the same to her and her heirs forever.

"3. I give and devise to my son, E. W. Lentz, the dwelling-house and lot known as No. 1223 Fourteenth Street, in the city of Hickory, where T. T. Hamilton now lives, to have and to hold the same to him, the said E. W. Lentz, his heirs and assigns forever.

"4. I give and devise to my son, Frank W. Lentz, the dwelling-house and lot situate in the city of Hickory at the corner of Ninth Avenue and Twentieth Street, to have and to hold the same to him the said Frank W. Lentz his heirs and assigns forever. And in order to equalize the value of the real estate herein devised, I further give and bequeath unto my said son, Frank W. Lentz, ten (10) shares of the capital stock of the First National Bank, of Hickory, N. C.

"5. I give and devise to my daughter, Frances E. Lentz, the dwelling-house and lot known as No. 1229 Fourteenth Street, situated at the corner of said street and Thirteenth Avenue, in the city of Hickory, to have and to hold the same to her, the said Frances E. Lentz, and her heirs forever. And in order to equalize the value of the real estate herein devised, I also give and bequeath to my said daughter, Frances E. Lentz, ten (10) shares of the capital stock of the First National Bank, of Hickory, N. C.

"6. I also give and devise to my daughter, Frances E. Lentz and my son, Frank W. Lentz, the lot and dwelling-house located in the city of Hickory, same being No. 1217 Fourteenth Street, where E. W. Lentz now resides, to have and to hold the same to them, their heirs and assigns forever.

"7. To my four children, namely, Mrs. Winnie Lee Keever, E. W. Lentz, Frank W. Lentz and Frances E. Lentz, I give, devise and bequeath my lumber business, operated in the name of J. A. Lentz, including the real estate in said city of Hickory where located, machinery, supplies, equipment, accounts and notes receivable and all property used in connection with the operation of said lumber business: Provided, however, that all bank notes and debts owing for lumber and supplies, or contracted in the operation of the business aforesaid, which may be owing by me at my death, shall be paid by the said Mrs. Winnie Lee Keever, E. W. Lentz, Frank W. Lentz and Frances Lentz, in equal proportions, that is to say, all debts growing out of the business aforesaid shall be paid by the parties aforesaid.

"8. I give and bequeath and devise to my wife, Blanche F. Lentz, and our son, John A. Lentz, Jr., the use, occupancy and enjoyment of our residence property in Hickory, N. C., situated on 20th Street, and containing 25 acres, more or less, with all furnishings and equipment of whatever kind, all outbuildings, stock, etc., for and during the term of the natural life of the said Blanche F. Lentz, and after her death remainder in fee to the said John A. Lentz, Jr., his heirs and assigns forever. However, if the said John A. Lentz, Jr., shall not be living at the time of the death of my wife, and shall leave no issue capable of inheriting, then and in that event, said property shall be equally divided among my four children, namely, Winnie Lee Keever, E. W. Lentz, Frank W. Lentz and Frances E. Lentz.

"9. I give and bequeath unto my wife, Blanche F. Lentz, absolutely and unqualifiedly, all of my personal property whatsoever and wheresoever situated, other than the 20 shares of stock in the First National Bank of Hickory, N. C., bequeathed to Frances E. Lentz and Frank W. Lentz, and my interest and holdings in the lumber business aforesaid herein devised and bequeathed to my four children above named. With the exception of the 20 shares of stock in the First National Bank and my lumber business aforesaid, this bequest to my wife is made absolutely with the sole provision that she shall pay any and all just debts which I may be owing at my death, including funeral expenses, except any indebtedness against me in connection with my lumber business aforesaid which latter indebtedness shall be paid by the four children above named to whom said business is bequeathed and devised. I shall leave it to the good judgment of my wife to make any provision necessary for the proper maintenance and education of our son, John A. Lentz, Jr., out of the property herein specifically bequeathed to her.

"10. All the rest and residue of my real estate, wheresoever situated, I give and devise to my four children, Winnie Lee Keever, E. W. Lentz and Frank W. Lentz and Frances E. Lentz, share and share alike: Provided they shall pay the costs of administration.

"11. By way of general explanation, the provisions made herein for my wife, Blanche F. Lentz, are to be in lieu of dower and distributive share of my estate.

"Any moneys or other property which I may have heretofore given to my several children or may myself give them in my lifetime, are to be taken to be gifts and not as advancements, and are not to be accounted for by them in the distribution of my estate: Provided, however, that if my executor should be required to pay any note or other obligation upon which I am an endorser or surety for any of my children, then such sum or sums so paid shall be charged against the account of the child for whom it is paid and shall be taken out of such child's interest in the lumber business aforesaid devised and bequeathed to them.

"Should any of my children predecease me, and be not living at my death, then the children of any such deceased child of mine shall stand in his or her stead and take under the provisions of this will in place of such deceased child or children: Provided, however, that if any of my children are dead without leaving lineal descendants, the provisions herein made for such child or children shall go to my other children equally.

"12. I hereby constitute and appoint the First Security Trust Company, of Hickory, N. C., my lawful executor to all intents and purposes, to execute, without bond, this my last will and testament according to the true intent and meaning thereof, hereby revoking and declaring utterly void all other wills by me heretofore made. Said executor shall receive the sum of $750.00 in lieu of commissions, or compensation allowed by law, for its services in connection with the settlement of my estate same to be paid out of the property herein bequeathed and devised to Winnie Lee Keever, E. W. Lentz, Frank W. Lentz and Frances E. Lentz, in equal proportions.

"In the payment of inheritance taxes, my executor shall pay in such manner as such inheritance taxes may be assessed against my wife and children and out of such property as I have herein devised and bequeathed to them, and in just and equal proportion thereto according to the valuation placed thereon by the Inheritance Tax Assessor. In other words, the shares given to my wife and each of my children shall bear its own proportion of the inheritance tax assessed against such shares.

"In witness whereof, I, the said J. A. Lentz, do hereunto set my hand and seal, this 14 November, 1921.

"J. A. LENTZ (Seal).

Witnesses: Jno. W. Bohannon, L. H. Warlick, Jr., W. Whisnant."

The testator left him surviving four children by his first marriage, to wit, Winnie Lee Keever, E. W. Lentz, F. A. Lentz and Frances Lentz, his widow, Blanche F. Lentz, and two children by his second marriage, John A. Lentz, Jr., and little Blanche F. Lentz, who was born after the making of her father's will, and the testator died without making any provision for her. C. S., 4169.

On 27 May, 1925, Winnie Lee Keever, E. W., F. A. and Frances Lentz filed with the executor their relinquishment of all claim to the "lumber business," under the conditions of the 7th paragraph of the will, and authorized the executor to deal with this property as though such paragraph did not appear in the will.

Thereafter, the executor instituted an action in the Superior Court of Catawba County for the purpose of obtaining a construction of the will, in which certain questions were submitted to the court for answer and direction, and at the September Term, 1926, judgment was rendered therein, from which no appeal was taken, which provides, in substance, as follows:

"First: That Mrs. Winnie Lee Keever, E. W. Lentz, Frank W. Lentz, and Frances E. Lentz, under articles two, three, four and five of the will of John A. Lentz, deceased, take the property therein devised or bequeathed, both real and personal, free and discharged from all indebtedness, except and so far as the same may be necessary to pay any debts of the deceased not otherwise provided for.

"Second: That Frances E. Lentz and Frank W. Lentz take the property described in article six of the will, except and so far as the same may be necessary and required to pay any debts of the deceased not otherwise provided for.

"Third: That Mrs. Winnie Lee Keever, E. W. Lentz, Frank W. Lentz and Frances E. Lentz, under article seven of the will take the property therein described, provided they pay all indebtedness incurred on account of the operation of the lumber business. In case they refuse to comply with the condition expressed in said article, then all the property described in said article, both real and personal, remains to be disposed of and the indebtedness incurred in the operation of the lumber business is to be discharged as though the deceased died intestate.

"Fourth: That Mrs. Blanche F. Lentz, widow of the testator, takes a life estate in the real estate described in article eight of the will with remainder in fee to John A. Lentz, Jr., on condition he be living at the death of Mrs. Blanche F. Lentz.

"Fifth: Mrs. Blanche F. Lentz under article nine takes all personal property belonging to the deceased at the time of his death except the twenty shares of bank stock and the personal property belonging to and used in connection with the lumber business, provided she pays all debts existing at the time of the death of the deceased including funeral expenses except debts incurred in the operation of the lumber business. If she refuses to comply with the condition expressed in said article, then and in that event, all such personal property remains to be disposed of and all such debts remain to be discharged as though the deceased died intestate.

"Sixth: Under article ten of the will, the four children of the first marriage, *i. e.,* Winnie Lee Keever, E. W. Lentz, Frank W. Lentz, and Frances E. Lentz, take all the real estate not described in former articles of the will provided they pay the costs of administration, but they take it only if not required to be sold for payment of debts of the estate or such remainder as may not be necessary to be sold and proceeds used in payment of debts of the estate and upon payment by them of the costs of administration."

This present action was instituted 28 January, 1927, for the purpose of ascertaining the values of the respective legacies and devises and for an accounting, separating the debts of the "lumber business" from others of the estate. The liabilities of the lumber business exceeded its assets by more than $15,000. The testator disposed of his entire estate without making adequate provision for the payment of his debts.

A reference was ordered and the matter heard by Hon. S. J. Ervin, who found the facts and reported the same, together with his conclusions of law, to the court. Upon exceptions duly filed to the report of the referee, the same was modified and affirmed, from which appeals, as above noted, have been prosecuted.

H. G. Stephens and E. B. Cline for plaintiff.

W. B. Council and Mark Squires for defendants, E. W. Lentz, Frances Lentz, Winnie Lee Keever and Frank Lentz, appellants.

Self & Bagby and Bailey Patrick for defendants, Mrs. Blanche Lentz, John A. Lentz, Jr., and Blanche Lentz, appellees.

STACY, C. J., after stating the case: The right of the plaintiff to bring this action and to seek the advice of the Court on an existing state of facts, upon which a decree or some direction in the nature of a decree may be founded, is supported by a number of decisions, notably *Balsley v. Balsley,* 116 N. C., 472, 21 S. E., 954, *Tyson v. Tyson,* 100 N. C., 360, 6 S. E., 707; *Little v. Thorne,* 93 N. C., 69, and *Tayloe v. Bond,* 45 N. C., 5.

It may be observed *in limine* that with the exception of the homestead right and the rights of a widow, which generally are superior to the rights of creditors, the debts of a decedent must be paid, if he leave anything with which to pay them, and if his estate be not sufficient to pay his debts in full, then they are to be paid in classes, with those of the last class, if and when reached, sharing ratably in what is left. C. S., 93; *Murchison v. Williams,* 71 N. C., 135. But he has nothing to give away until his debts have been paid or his obligations have been fulfilled. Equity, which delighteth in equality, as well as the law, which commands the right, requires that a man shall be just before he is generous, for generosity ceases to be a virtue when indulged in at the expense of creditors.

In considering the will now under review, regard should be had to the construction heretofore placed upon it by the Superior Court of Catawba County as appears from the judgment entered at the September Term, 1926, to which no exception was taken, and from which no appeal was prosecuted.

Preliminarily, it should be stated that little Blanche F. Lentz, the child born after the making of her father's will, and whose father died without making any provision for her, is entitled to such share and proportion of her father's estate as if he had died intestate. C. S., 4169; *Christian v. Carter,* 193 N. C., 537, 137 S. E., 596; *Sorrell v. Sorrell,* 193 N. C., 439, 137 S. E., 306. This is conceded on all hands.

With respect to the order of affecting assets, or the priority of their application, the general rule is, that in the absence of any controlling direction by the decedent to the contrary, the personal estate is primarily liable for the payment of the debts of the deceased. *Moseley v. Moseley,* 192 N. C., 243, 134 S. E., 645; *Pate v. Oliver,* 104 N. C., 458, 10 S. E., 709; *Murchison v. Williams,* 71 N. C., 135; *Robards v. Wortham,* 17 N. C., 178. Next in order usually come estates devised for the payment of debts. Then estates descended or undevised. And lastly estates specifically devised, subject to, or generally charged with the payment of debts. *Galton v. Hancock,* 2 Atkyns, 428; *Donne v. Lewis,* 2 Brown's C. C., 256; *Hinton v. Whitehurst,* 68 N. C., 318; *Graham v. Little,* 40 N. C., 407; *Shaw v. McBride,* 56 N. C., 173; *Knight v. Knight,* 59 N. C., 134; *University v. Borden,* 132 N. C., 477. It should be observed, however, that while the personal estate is originally liable, yet the testator may exempt it, in whole or in part, by express words or manifest intention, from the payment of all or a part of his debts. *Webb v. Jones,* 2 Brown's Cha. Rep., 60.

Here, the testator has charged his "lumber business" with the payment of the debts arising from such business, in ease of his personal estate, and in definite and unequivocal language he undertakes to exonerate his personal property from the payment of any debts arising from the operation of the lumber business; but he specifically charges his personal estate, bequeathed to his wife in item 9 of the will, with any and all debts existent at the time of his death, and funeral expenses, except indebtedness contracted in connection with the lumber business, while in item ten the cost of administration is specifically charged against the residuary devise. Hence, the personal property must be held exempt from the primary burden of paying the debts of the lumber business. This is in accordance with the judgment of the Superior Court of Catawba County entered at the September Term, 1926.

But as the liabilities of the lumber business exceed the assets of said business to the extent of something more than $15,000, and the record shows other debts not yet paid, with no adequate provision made for their payment, the question presented for decision is, what property shall next be taken to pay these debts? Again, attention is directed to the fact that in seeking to ascertain the intention of the testator, regard must be had to the construction heretofore placed upon the will by the Superior Court of Catawba County, to which no exception was taken and from which no appeal was prosecuted.

If, after following the rule above stated, it should become necessary to resort to the fourth-class, or to the estates specifically devised, including the property bequeathed to the widow in lieu of dower, we think the devisees in this class and the widow who, by reason of the peculiar provisions of the will, as heretofore construed by the Superior Court of Catawba County, seems to stand on a parity with them, are entitled to equality of contribution as among themselves. *Murchison v. Williams, supra.* But the executor is not required to adjust the question of contribution as among the devisees in the fourth-class and the widow who stands on a parity with them. It may proceed in the most expeditious and judicious manner for the settlement of the estate, having regard, of course, for the order of affecting assets, or the priority of their application, and leave the devisees of the fourth-class and the widow to settle their differences among themselves. *Bruton v. McRae,* 125 N. C., 206, 34 S. E., 397.

This course seems not to have been followed in the court below, hence the judgment will be vacated and the cause remanded for further proceedings, not inconsistent with this opinion and as the further rights of the parties may require.

Leave will be granted the parties to file additional exceptions to the report of the referee, if so advised, or the matter may be heard and determined on the exceptions already filed.

In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference, as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm, the report of a referee. *Contracting Co. v. Power Co.,* 195 N. C., 649, 143 S. E., 241; *Mills v. Realty Co., ante,* 223, 145 S. E., 26.

Error and remanded.

FIRST SECURITY TRUST COMPANY, EXECUTOR OF THE WILL OF J. A. LENTZ, DECEASED, v. MRS. BLANCHE F. LENTZ, MRS. WINNIE LEE KEEVER AND HER HUSBAND, CLARENCE KEEVER, E. W. LENTZ AND WIFE, BLOSSOM LENTZ, FRANK A. LENTZ AND WIFE, ANNIE LENTZ, FRANCES E. LENTZ, JOHN A. LENTZ, JR., AND BLANCHE LENTZ, THE LAST TWO BEING MINORS AND REPRESENTED BY THEIR GUARDIAN, MRS. BLANCHE F. LENTZ.

(Filed 19 December, 1928.)

For Digest see *Trust Co. v. Lentz, ante,* 398.

APPEAL by plaintiff from *Finley, J.,* at May Term, 1928, of CATAWBA.

Special proceedings instituted by First Security Trust Company executor under the will of John A. Lentz, deceased, against the devisees, legatees and afterborn child of the testator, to sell certain real and personal property to make assets for the payment of the debts of the decedent.

From a judgment declining to order a sale of some of the personal property, and directing the executor how to proceed, the plaintiff appeals, assigning errors as to said order and directions.

H. G. Stephens and E. B. Cline for plaintiff.

Self & Bagby and Bailey Patrick for defendants, Mrs. Blanche F. Lentz, John A. Lentz, Jr., and Blanche Lentz.

W. B. Councill and Mark Squires for defendants, Winnie Lee Keever, E. W. Lentz, et al.

STACY, C. J. This is a companion case to another case between the same parties, just decided, and is controlled by what was said in that case.

The rule respecting the order of affecting assets, or the priority of their application under the provisions of the will as announced in the first case, seems not to have been followed in the court below, hence the present proceedings will be remanded for further action, not inconsistent with the opinion rendered in the other case.

The executor is entitled to proceed in the most expeditious and judicious manner for the settlement of the estate, observing, of course, the order of affecting assets, or the priority of their application, but it is not required to await the adjustment of ratable contribution among those standing on a parity in this respect.

Error and remanded.

E. D. STEELE v. METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 19 December, 1928.)

1. **Insurance—Life Insurance—Proof of Death—Presumption of Death After Seven Years Absence.**

The common-law presumption of death of a person who has disappeared and not been heard from for seven years, under certain conditions, applies to a policy of insurance issued upon a person's life, and when he has validly assigned the policy for the payment of a debt, the person to whom it has been assigned may upon the necessary proof legally established, recover the amount of the policy from the insurance company, and an order requiring him to give a bond for the protection of the company paying the policy in the event the insured should still be alive, is erroneous. *Springer v. Shavender*, 116 N. C., 12, based upon the right of an administrator to sell lands to pay decedent's debts, cited and distinguished.

2. **Same.**

The common-law doctrine of presumptive death becomes a part of a contract of life insurance as if therein written.

3. **Death—Evidence of Death—Presumption of Death After Seven Years Absence—Questions for Jury.**

Sufficient evidence of presumptive death under the common law takes the question of the death to the jury in rebuttal of the presumption that the person is yet alive.

4. **Same—Common Law.**

The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. C. S., 970.

APPEAL by plaintiff from *Stack, J.*, and a jury, at June Term, 1928, of GUILFORD. Reversed.

This was an action brought by plaintiff against defendant, on 27 September, 1926, to recover on a policy of insurance. John M. Harrell had a 10-year term policy in the sum of $2,500 on his life in defendant's company. For value it was transferred to plaintiff and assented to by defendant, on 5 February, 1913. The policy was issued 13 November, 1912, the annual premium being $27.25. It was renewed 13 November, 1922, the annual premium being $34.88.

The following allegations of plaintiff are admitted by defendant: "That said policy of insurance carries the privilege of renewal or extension under certain conditions, all of which have been complied with. That on 9 November, 1922, the said policy was renewed for the further term of ten years from 13 November, 1922, to 13 November, 1932, by agreement between the interested parties, including this plaintiff, subject to all its conditions, agreements and provisions, except that the insured should in each and every year during said term pay a premium of $34.48. That all premiums which have matured and become payable by the terms of said policy have, in accordance with the terms thereof been paid."

It is alleged by plaintiff that for more than seven years before bringing this action John M. Harrell had left his home in High Point, N. C., and had gone to Gainesville, Fla., stayed there a short while, and has never been heard of since. Diligent search and inquiry have been made for him by his relatives and friends in North Carolina and also by his friends in Gainesville, Fla. No communication has ever come from him to his family and friends or anyone else. That "this plaintiff verily believes that the said Harrell is in fact dead, as well as presumptively dead from his long absence without news from him. That prior to the bringing of this action this plaintiff made proof of the death in fact or presumptive death on account of the matters and things hereinbefore set out of the said Harrell and demanded payment of the said $2,500, according to the terms of said policy, on account of the matters and things hereinbefore set out; that payment was refused by the defendant."

Defendant denied that Harrell was dead and demanded strict proof, and contends that he has been heard from in the last seven years. The defendant introduced no testimony, but the defendant, on cross-examination, elicited from plaintiff's witnesses evidence tending to show that the said John M. Harrell was seen by his nephew, J. C. Reitzel, in Norfolk, Va., in 1919, and that at the time he was an officer in the United States Navy, going under an assumed name, and that it had been reported to friends and relatives that he was in California, Cuba and South America. That he got into financial difficulties in High Point and also in Gainesville, Fla.

It was in evidence that Harrell owed plaintiff more than the face amount of the policy.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the insured, John M. Harrell, dead at the date of bringing this action? Answer: Yes.

"2. Did the said John M. Harrell assign the policy sued on in this action to E. D. Steele, the plaintiff, as alleged in the complaint? Answer: Yes.

"3. Does the indebtedness of the said John M. Harrell to the said E. D. Steele amount to as much as the face amount of said policy? Answer: Yes."

The evidence introduced by plaintiff was sufficient to be submitted to the jury on the issues.

The judgment in the court below is as follows: "On motion of King, Sapp and King, attorneys for plaintiff, it is ordered, adjudged and decreed by the court that the plaintiff, E. D. Steele, have and recover of the defendant, Metropolitan Life Insurance Co., of New York, the sum of $2,500, the face of the policy sued on, together with interest thereon from 28 September, 1926, till paid, together with the costs of the action to be taxed by the clerk. No execution to issue until plaintiff files bond in the sum of $3,000, with sufficient surety to indemnify defendant against loss in event John M. Harrell is in fact living."

Plaintiff excepted and assigned error to the following part of the judgment: "No execution to issue until plaintiff files bond in the sum of $3,000, with sufficient surety to indemnify defendant against loss in event John M. Harrell is in fact living."

King, Sapp & King for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

CLARKSON, J. Has the court the power to require plaintiff, who is assignee of a life insurance term policy, *to give bond for return of money awarded by verdict of a jury,* to wit, amount of policy which is less than amount due the plaintiff by insured, on allegation and proof of absence of insured for more than seven years without being heard from by those who would be expected to hear if insured were living? We think not.

The policy issued is a ten-year renewable term policy. It was issued on 13 November, 1912, and renewed on 12 November, 1922.

Defendant contends that the case presents a new question in this jurisdiction, and cites as an analogous case *Springer v. Shavender,* 116 N. C., 12—rehearing *Springer v. Shavender,* 118 N. C., 33. The *Springer case* is bottomed on a statute (C. S., 74): "When the personal estate of a *decedent* is insufficient to pay all of his debts . . . to sell the real property for the payment of the debts of such *decedent.*"

That case, and the authorities relied on, are to the effect that the jurisdiction acquired is to deal with the estates of *dead men.* The Court in that case (116 N. C., 12), quoting headnote, held: "The appointment of an administrator upon the estate of a living man is void for all purposes, and everything that is founded upon it is a nullity, because there was no jurisdiction to appoint. *(Quære,* whether an administration granted, not upon false information as to a person's death, but upon a presumption of law arising from his absence without being heard from for seven years, does not make the acts of the administration valid." In the body of the opinion it is said (at p. 18): "Should a case be presented where administration has been granted not upon false information of a person's death but upon a presumption of law arising from his absence without being heard from for seven years, a different question might be presented." The present action is one at law based on the contract.

General laws of a State in force at the time of execution and performance of contract become part thereof. *Ryan v. Reynolds,* 190 N. C., 563; *Hughes v. Lassiter,* 193 N. C., at p. 657.

As a party consents to bind himself, so shall he be bound. *Ideal Brick Co. v. Gentry,* 191 N. C., 640.

C. S., 970, is as follows: "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which had not been otherwise provided for in whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this State." Jones on Evidence (2d ed.), part of sec. 61, is as follows: *"Presumptions of death after seven years absence.* As the courts had to resort to the presumption of the continuance of life, in the absence of direct proof of life or death, in order to settle important rights which were often involved, it became equally necessary to adopt some counter presumption in classes of cases where the death of the person would in the ordinary course of events seem more probable than the continuance of life. Accordingly in analogy to certain English statutes the courts adopted the rule that 'A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.'" 17 C. J., pp. 1166-67; secs. 5 and 6; *Sizer v. Severs,* 165 N. C., 500; *Beard v. Sovereign Lodge,* 184 N. C., at p. 157.

Cooley's Briefs on Insurance (2d ed.), Vol. 6 (1928), p. 5167-8, says: "In the case of the disappearance of the insured, the proof of death must rest on either circumstantial evidence or presumption. Death cannot be inferred from the mere fact of disappearance, but all the facts and circumstances connected therewith must be considered (*Fidelity Mut. Life Ass'n v. Mettler,* 185 U. S., 308, 22 S. Ct., 662, 46 L. Ed., 922), and while the plaintiff is not bound to prove conclusively that the insured is dead, he is bound to produce such evidence as would fairly lead to such presumption (*Modern Woodmen v. Gerdom,* 77 Kan., 401, 94 P., 788). . . . (p. 5169.) *The common-law presumption of death after an absence of seven years, during which the person* *has not been seen or heard from, is applied in the case of a disappearance of an insured.* (Italics ours.) *Kendrick v. Grand Lodge A. O. U. W.*, 8 Ky., Law Rep., 149; *Mutual Ben. Life Co. v. Martin,* 55 S. W., 694; 108 Ky., 11; *Hancock v. American Life Ins. Co.,* 62 Mo., 26; *Supreme Commandery of Order of Knights of Golden Rule v. Everding,* 20 Ohio Cir. Ct. R., 689, 11 O. C. D., 419; *Reynolds v. North American Union,* 204 Ill. App., 316; *Shank v. Modern Woodmen,* 213 Ill. App., 506; *Seidenkranz v. Supreme Lodge, Knights and Ladies of Honor,* (Mo. App.), 199 S. W., 451. . . . (p. 5170.) The presumption as to the fact of death arising from the absence of the insured does not, however, carry with it any presumption as to the time of death. That branch of the question must rest on proof." *Ingram v. Metropolitan Life Ins. Co.,* 37 Ga. App. Rep., 206, 139 S. E., 363. *Lewis v. Lewis,* 185 N. C., 5.

The presumption of death after seven years absence of one who has disappeared and has not been heard from, after diligent search and inquiry, in reason and by authorities, applies to those who are insured. The presumption of seven years has long been the common law, which obtains in this jurisdiction. The contract of insurance is interpreted in reference to existing laws pertinent to the subject. The laws in force become a part of the contract as if they were expressly incorporated. The issue found by the jury is that the insured was dead at the date of the bringing of this action. By the verdict of the jury it was established that the insured is in fact dead so far as the rights of the parties are concerned. The court below had no power to impose on plaintiff the giving of bond, as set forth in the judgment.

For the reasons given that part of the judgment appealed from by plaintiff is

Reversed.

W. L. PEACOCK v. CITY OF GREENSBORO.

(Filed 19 December, 1928.)

1. **Municipal Corporations—Public Improvements—Damages—Notice of Claim.**

A valid charter provision of a city that no action for damages shall be instituted against it unless within six months after the damage notice shall be given in writing to the municipal authorities of the date and place and the amount of damages claimed, is substantially complied with if a notice is filed which puts the municipality upon notice of the character, place, and time of the injury, and the amount of damages claimed, and is sufficient to apprise it of the nature and character of the damages sought in the action.

2. Same—Time of Accrual of Cause of Action.

Where there is a valid provision in the charter of a municipality requiring written notice of a claim of damages for an injury within six months from the time of the occurrence of the injury, the required notice given within six months from the time of the first appreciable or substantial injury is a compliance with the provision as to the time of notice.

3. Same—Permanent and Temporary Damages.

Where damages are claimed against the city for ponding water back upon lands abutting a stream, and the case is tried upon the theory that a smaller or meter dam, erected subsequently to a larger dam, was the cause of the injury in suit, and by consent this meter dam is ordered to be removed by the court: *Held,* a new trial will be ordered on appeal when it does not appear with sufficient certainty whether the jury, under the evidence and instructions, have excluded the award of permanent damages from the verdict.

APPEAL by defendant from *McRae, Special Judge,* at February-March Term, 1928, of GUILFORD. New trial.

Action to recover damages, caused by the ponding of water on plaintiffs land, by means of a dam erected by defendant in and across a stream, known as Reedy Fork. Plaintiff's land abuts on said stream.

Defendant is a municipal corporation and owns lands also abutting on Reedy Fork, below the land of the plaintiff. Defendant acquired and holds said land as a source of its water supply. For the purposes of increasing its water supply, and for other purposes, it has constructed dams on its lands in and across Reedy Fork.

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff give notice to the defendant of his claim within six months from the time when the first substantial injury to his said property was sustained, as alleged in the complaint? Answer: Yes.

"2. Is the plaintiff, W. L. Peacock, the owner of the land described in the complaint? Answer: Yes.

"3. Has the defendant, the city of Greensboro, appropriated for public use the plaintiff's property in whole or in part, without due compensation, as alleged in the complaint? Answer: Yes.

"4. What sum, if any, is the plaintiff entitled to recover of the defendant as compensation for such appropriation of said plaintiff's property for the uses and in the manner alleged in the complaint? Answer: $2,500."

The judgment rendered on the verdict includes a clause in words as follows:

"And by consent of counsel representing the plaintiff and defendant, it is ordered that defendant remove the obstruction in Reedy Fork, known as the meter dam, located just east of Reedy Fork bridge on the highway leading from Greensboro to Summerfield, the said obstruction to be removed within sixty days from the end of this term."

From judgment that plaintiff recover of defendant the sum of $2,500, and costs, defendant appealed to the Supreme Court.

Adams & Adams and Frazier & Frazier for plaintiff.

Andrew Joyner, Jr., Robert Moseley and A. Wayland Cooke for defendant.

CONNOR, J. Defendant first contends that there was error in the refusal of its motion for judgment as of nonsuit (C. S., 567), for that,

1. The notice of plaintiff's claim for damages, filed with defendant, as required by a provision in defendant's charter, was not sufficient in form and substance, to constitute compliance with said provision,

2. If the notice of claim was sufficient in form and substance, it was not filed within the time required by said provision.

Section 82, chapter 37, Private Laws of North Carolina, 1923, which is the charter of the city of Greensboro, is as follows:

"Section 82. That no action for damages against said city of any character whatever, to either person or property, shall be instituted against said city unless, within six months after the happening or infliction of the injury complained of, the complainant, his executors, or administrators, shall have given notice in writing to the council of such injury, stating in such notice the date and place of happening or infliction of such injury and the amount of damages claimed therefor; but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of the happening or infliction of such injuries, or in any manner interfere with its running."

Applying the principle upon which *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466, was, in part, decided, we must hold that the notice of claim, set out in the record in this case, was sufficient in form and substance, as a compliance with the foregoing provision. In that case, it was held, both on principle and under authorities cited in the opinion, that a substantial compliance with a provision in the charter of the city of Charlotte, identical in all respects with the foregoing provision in the charter of the city of Greensboro, is all that is required. In the instant case, the notice in writing was sufficient to inform defendant of all the facts upon which plaintiff's claim for damages was founded, and to enable defendant, after an investigation of the claim within a reasonable time, as fixed by the statute, after the claim for damages arose, to determine whether or not it should admit liability and undertake to adjust and settle said claim. This is the manifest purpose of the statute. The claimant is not required in stating the amount of his damages, in his written notice, to apportion said amount to the several acts of the city, which he claims caused the injuries which resulted in his damages.

The notice in writing filed with the city council, as required by statute, is sufficient, if there is stated therein the date and place of the injury, together with the amount of damages claimed therefor. It is not required that the notice shall be drawn with the technical nicety necessary in a pleading. In the instant case, as in *Graham v. Charlotte, supra,* the city had ample notice of the cause of the injury for which damages were claimed, to wit: the ponding of water by it on plaintiff's land.

In his complaint, plaintiff alleges that on or about 1 September, 1925, defendant caused to be erected across Reedy Fork the dam referred to in his "amended notice," filed with the city on 25 May, 1926. He alleges that the injuries for which he seeks to recover damages in this action were caused by water impounded on his land by this dam. There was evidence tending to show that the injuries, resulting in the first appreciable and substantial damages to plaintiff, were inflicted or happened on or about 1 December, 1925, and that since said date, and continuing up to the date of the trial, the damages have greatly increased. The water which caused plaintiff's injuries was not impounded on his land immediately after the construction of the dam in September, 1925. It was only after the water in Reedy Fork had been greatly increased in volume by rains, that the plaintiff's land was injured. Three or four months elapsed after the construction of said dam before any appreciable or substantial damages were sustained by plaintiff.

On 2 March, 1926, plaintiff filed a notice in writing of his claim for damages caused by the ponding of water on his land by the city of Greensboro. In this notice, he stated that a large dam constructed by the city at its water supply station was the cause of his damages. There was evidence tending to show that this large dam was constructed in 1924. The city declined to allow the claim for which this notice was filed. Thereafter, on 25 May, 1926, plaintiff filed "an amended notice" of his claim. This claim was for the same damages, substantially, as those for which the original notice was filed, on 2 March, 1926. In his "amended notice," plaintiff alleges that the small dam constructed by the city in September, 1925, was the cause of the damages which he had suffered. In both the original and the amended notice, plaintiff claims damages for injuries to his land caused by the ponding of water thereon by defendant. For the purpose of determining defendant's liability to plaintiff, it is immaterial whether the damages were caused by the large dam, constructed in 1924, or by the small dam, constructed in 1925. Plaintiff does not claim that his land was injured by either dam. The injuries for which he claims damages were caused by the ponding of water on his land. There was evidence tending to show that there was no appreciable or substantial damages until on or about 1 December, 1925. Plaintiff's cause of action accrued on the date when such damages arose. *Ragan v. Thomasville, ante,* 260; *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827; *Cardwell v. R. R.,* 171 N. C., 365, 88 S. E., 495; *Barcliff v. R. R.,* 168 N. C., 268, 84 S. E., 290; *Roberts v. Baldwin,* 151 N. C., 408, 66 S. E., 346. While there was evidence to the contrary, there was also evidence from which the jury could find that plaintiff filed with defendant notice in writing of his claim for the damages which he seeks to recover, in this action, within six months from the time when he sustained the first appreciable and substantial damage. Whether plaintiff relies upon the original notice, filed on 2 March, 1926, or on the "amended notice," filed on 25 May, 1926, if his cause of action arose on or about 1 December, 1925, there was a compliance by him with the provision in defendant's charter, which makes the filing of a notice in writing, within six months after the cause of action arose, a condition precedent to his recovery. Whether a notice filed within the time prescribed by statute, may be amended after such time has expired, for the purpose of complying with the statutory provisions, is not presented on this record. There was no error in the refusal of defendant's motion for judgment as of nonsuit. The evidence was properly submitted to the jury, upon the first issue.

Defendant's second contention is that upon this record, if plaintiff is entitled to recover at all, he is not entitled to recover permanent damages, for the reason that it appears upon the record that there has been no appropriation of plaintiff's land for permanent purposes, but that the injuries, if any, to said land, caused by the ponding of water thereon, are temporary, and that said injuries will cease when the small or meter dam is removed by defendant, in accordance with the provision in the judgment, included therein by consent. Defendant contends that at most plaintiff is entitled to recover temporary damages, only, resulting from a trespass. These contentions are presented by assignments of error based upon exceptions (1) to the admission and exclusion of evidence; (2) to the refusal to submit issues tendered by defendant; (3) to the submission of the issues answered by the jury; and (4) to instructions of the court in the charge to the jury upon the issues submitted.

Defendant, in its answer, admitted that during September, 1925, it caused to be constructed the small or meter dam across Reedy Fork Creek, by which plaintiff alleges that water was ponded on his land. The injuries for which plaintiff demands damages in this action were caused by this dam. In an amendment to its answer, filed by leave of court, defendant alleges:

"That the structure complained of by plaintiff was erected in Reedy Fork Creek for the purpose of measuring the volume of water flowing through said stream; that the same consists of wooden timbers and boards, and is temporary in character and nature of construction. The defendant further avers that it is its purpose to remove said structure within a reasonable time, not exceeding sixty days, from the termination of this, the February Term of this court, and defendant obligates itself so to do; and defendant pleads this in bar of any permanent damages."

There was evidence tending to sustain the allegations of fact in this amendment, and the court, in the judgment, by and with the consent of plaintiff, ordered that defendant remove from Reedy Fork Creek the small or meter dam within sixty days from the expiration of the term of court at which the judgment was rendered.

Plaintiff, in the brief filed in his behalf in this Court, says that this action was instituted and proceeded to trial upon the theory that the small dam constructed by defendant was permanent in its nature and character. It was manifestly upon this theory of the case that the court admitted and excluded evidence, over defendant's objections, and subject to its exceptions; it was upon this theory that the court refused to submit the issues tendered by defendant, and submitted the issues answered by the jury. The instructions of the court, however, to the jury upon the fourth issue, were based upon the law with respect to temporary damages. If plaintiff was entitled to recover permanent damages, these instructions were erroneous; on the other hand, if the plaintiff was entitled to recover only temporary damages, as distinguished from permanent damages, there was error in the admission and exclusion of evidence, and with respect to the issues. Upon the record, it is impossible to determine whether the jury has assessed permanent or temporary damages. It is clear, we think, in view of the provision included in the judgment by consent of counsel for both plaintiff and defendant, with respect to the removal of the small or meter dam, that plaintiff is entitled to recover temporary damages, only, for injuries caused by trespass on his land; and that as there has been no appropriation of his land for permanent purposes, he is not entitled to recover permanent damages. *Mitchell v. Ahoskie,* 190 N. C., 235, 129 S. E., 626.

Defendant is entitled to a new trial. It is so ordered.

New trial.

IN RE WILL OF MARY COOPER.

(Filed 19 December, 1928.)

1. **Wills—Probate—Will Probated in Common Form Not Subject to Collateral Attack.**

   Where a will has been duly probated in common form it is conclusively presumed to be the will of the testator until set aside by a proceeding properly brought for the purpose, C. S., 4145, and is not subject to collateral attack.

2. **Wills—Probate—Probate of Second Will of Same Person—Signatures.**

   After a will has been duly probated in common form, to which no caveat has been entered, and a later paper-writing purporting also to be the will of the same deceased person is allowed to be produced and duly probated, the verdict of the jury upon a caveat filed thereto, under sufficient evidence and correct instructions that the later will was not signed by the testator, operates, in effect, to leave the will first probated the valid will of the testator therein, and the other issues in the caveat proceeding, which the jury did not answer, as to mental capacity and undue influence, and the question as to whether the first will could have thus been set aside, are immaterial.

3. **Wills—Requisites and Validity—Fraud—Signatures.**

   Evidence in a caveat proceeding that the testator was not capable of making a will and that under the circumstances he could not have signed it, is sufficient under the facts of this case to sustain a verdict that the will was a forgery.

4. **Wills—Requisites and Validity—Codicils.**

   Where a will has been duly admitted to probate as the last will and testament of the deceased, another and later will apparently independently written and making an entirely different disposition of the property cannot be construed and be given effect as a codicil to the former will.

STACY, C. J., dissents.

APPEAL by propounder from *Harding, J.*, at June Term, 1928, of MECKLENBURG. No error.

Proceeding for probate, in solemn form, of a paper-writing propounded by Charlie Williams, sole legatee and devisee named therein, as the last will and testament of Mary Cooper, deceased.

A caveat was filed to the probate of said paper-writing by E. P. Stowe, sole legatee and devisee named in a paper-writing, which was probated, in common form, as the last will and testament of said Mary Cooper, prior to the filing of said paper-writing for probate by Charlie Williams. No caveat has been filed to the probate of the will of Mary Cooper, under which E. P. Stowe, the caveator in this proceeding, claims as her sole legatee and devisee.

Issues involving the grounds upon which the caveat was filed were submitted to the jury. The verdict was as follows:

1. Is the signature of Mary Cooper to the paper-writing offered by propounder as the last will and testament of Mary Cooper, a forgery? Answer: Yes.

2. Was the execution of said paper-writing procured by the exercise of undue influence over the said Mary Cooper? Answer: ....

3. Did Mary Cooper, at the time of the execution of said paper-writing by her, have sufficient mental capacity to make a will? Answer: ....

4. Is the said paper-writing, the last will and testament of Mary Cooper? Answer: ....

The jury having answered the first issue, "Yes," under instructions of the court did not answer the other issues, but returned said answer as the verdict.

From judgment on the verdict, propounder appealed to the Supreme Court.

J. D. McCall and C. H. Edwards for propounder.
Thaddeus A. Adams for caveator.

CONNOR, J. Mary Cooper, an elderly colored woman—between 65 and 70 years of age—died at her home, in Charlotte, N. C., on 9 October, 1927. She had been sick about two weeks before her death. There was evidence that "she had been ailing pretty much all the year." She left surviving her no next of kin, and no heirs at law. At the date of her death, she owned property, real and personal, of the value of several thousand dollars.

On 26 October, 1927, a paper-writing, dated 9 December, 1914, was probated, in common form, by the clerk of the Superior Court of Mecklenburg County, as the last will and testament of the said Mary Cooper. This paper-writing was written by an attorney at law, a member of the bar of Charlotte, N. C. Its execution was attested by three witnesses, the draughtsman, another attorney at law, and a stenographer, who was employed in the office of the draughtsman. E. P. Stowe is named as the sole legatee and devisee in said will, of all the property of whatsoever kind, and wherever situated, both real and personal, of the said Mary Cooper; he is also appointed therein as the executor of said will. There was evidence tending to show that both prior and subsequent to the date of said paper-writing, to wit: 9 December, 1914, the relations between the said E. P. Stowe and Mary Cooper were friendly and intimate; he looked after her. Immediately after her death, the said E. P. Stowe took the said paper-writing from the "little treasure box," in which Mary Cooper had kept the same. Within a few days thereafter, the said paper-writing was propounded by E. P. Stowe, and was probated and recorded by the clerk of the Superior Court of Mecklenburg County as the last will and testament of Mary Cooper. The probate and record of said paper-writing is conclusive evidence that the same is the last will and testament of Mary Cooper. No caveat has been filed thereto. It has not been vacated on appeal or declared void by any competent tribunal. C. S., 4145. *Holt v. Ziglar,* 163 N. C., 390, 79 S. E., 805. The probate of said will, in common form, cannot be attacked, collaterally. *Varner v. Johnston,* 112 N. C., 570, 17 S. E., 483. The title of E. P. Stowe to all the property, real and personal, devised and bequeathed to him by the said will is good as against all persons, claiming under Mary Cooper, since her death, so long as said will stands.

On 31 October, 1927, another paper-writing, dated 4 October, 1927, was probated, in common form, by the assistant clerk of the Superior Court of Mecklenburg County, as the last will and testament of Mary Cooper. This paper-writing was written by Walter J. Harris, a colored man; its execution by Mary Cooper is attested by the said Walter J. Harris and Emma Harris, his wife. Charlie Williams is named therein as the sole legatee and devisee of all the property owned by Mary Cooper; no executor is named in said will, but the said Charlie Williams is directed to pay all the debts of said Mary Cooper. There was evidence tending to show that Charlie Williams had lived in the home of Mary Cooper for about a year before her death, and that during said time he had "waited" on her, when she was sick. Charlie Williams found said paper-writing in the wood shed on the premises of Mary Cooper after her death. It was among the bed clothes of deceased, which had been taken from her house to the wood shed. The said paper-writing was offered for probate as the last will and testament of Mary Cooper, by Charlie Williams, on 31 October, 1927. After its probate in common form, by the assistant clerk of the Superior Court of Mecklenburg County, as such last will and testament, to wit: on 2 November, 1927, a caveat to such probate was filed by E. P. Stowe, the executor, and sole legatee and devisee in the paper-writing probated on 26 October, 1927, as the last will and testament of Mary Cooper.

In said caveat it is alleged (1) that the signature of Mary Cooper in the paper-writing dated 4 October, 1927, is a forgery; (2) that if said signature is not a forgery, it was procured by fraud and undue influence upon the said Mary Cooper; and (3) that if said signature is not a forgery, the said Mary Cooper did not have sufficient mental capacity to make a will at the date of said paper-writing.

At the trial in the Superior Court of the issues submitted to the jury, involving the grounds upon which the caveat was filed, the jury found, in answer to the first issue, that the signature of Mary Cooper on said paper-writing is a forgery. Under instructions of the court, to which there were no exceptions, the jury did not answer the other issues, but returned the answer to the first issue as the verdict. Upon his appeal to this Court, the propounder, although assigning many other errors, relies, chiefly, upon his contention, duly presented by assignments of error, that there was no evidence from which the jury could find that the signature of Mary Cooper on said paper-writing, is a forgery. In view of our decision of the question presented by this appeal, it is not necessary for us to consider or pass upon assignments of error based upon exceptions pertinent to the issues, which under instructions of the court, were not answered by the jury.

The only evidence in behalf of the propounder, with respect to the execution of said paper-writing by Mary Cooper, was the testimony of Walter J. Harris, and Emma Harris, his wife. They both testified that said paper-writing, including the signature of Mary Cooper, was written by Walter J. Harris, at her home, and at her request, on 4 October, 1927. The signature of Mary Cooper on said paper-writing appears as follows: "Mary (her X mark) Cooper." Both witnesses testified that Mary Cooper touched the pen with which Walter J. Harris made the mark appearing between the words "Mary" and "Cooper," and that she requested each of them to witness her signature. They further testified that Walter J. Harris delivered said paper-writing after it had been executed by her, to Mary Cooper and that they then left her house. There was no evidence tending to show that any one saw the said paper-writing during the lifetime of Mary Cooper, after 4 October, 1927. Charlie Williams, who is named in said paper-writing as the sole legatee and devisee of all the property of Mary Cooper, testified that he did not see said paper-writing and did not know of its existence until several days after the death of Mary Cooper, when he found it, in the wood shed, among her bed clothes which had been taken from the house to the wood shed to be laundered. He had been informed after the death of Mary Cooper by Walter J. Harris that he had written a paper-writing for her prior to her death, but he did not know that said paper-writing purported to be a will, bequeathing and devising all her property to him. He did not consult an attorney about this paper-writing until nearly a month after he discovered it in the wood shed and was informed by Walter J. Harris that he had written said paper-writing for Mary Cooper prior to her death. There was evidence tending to show that in the meantime, after he found the paper-writing, Charlie Williams had surrendered the property of Mary Cooper to

E. P. Stowe, who claimed the same as the executor of Mary Cooper, under the will probated on 26 October, 1927, and that he had said on several occasions that Mary Cooper had willed everything to him, but that he "did not have it in black and white." There was evidence in behalf of the propounder tending to show that on 4 October, 1927, Mary Cooper had sufficient mental capacity to make a will.

There was evidence in behalf of the caveator tending to show that on 4 October, 1927, Mary Cooper did not have mental capacity sufficient to make a will. Dr. G. C. Wingate, a practicing physician of Charlotte, N. C., testified that he visited Mary Cooper, professionally, on Sunday, 2 October, and on Tuesday, 4 October, 1927; that on said days she had acute dysentery, and was toxic; that the absorption of the poison affected her nervous system so that she was incapable of attending to her affairs. She was decidely worse on Tuesday, the 4th, than on Sunday, the 2d. In the opinion of this witness, the deceased was incapable of making a will at any time from Tuesday, the 4th, to Sunday, the 9th of October, when she died.

W. H. Hunnicutt, a police officer of the city of Charlotte, testified that he went to the home of Mary Cooper, on or about 26 October, 1927, and read to Charlie Williams the will of Mary Cooper, probated on 26 October, 1927, by which all her property was bequeathed and devised to E. P. Stowe; that Charlie Williams, after witness had read the said will to him, stated that he was willing to turn everything over to Stowe, without any trouble. Charlie Williams said nothing about another will, under which he claimed the property of Mary Cooper.

Jim McConnor, a blacksmith, testified that Charlie Williams was at his shop on 26 October, 1927, and then said that Mary Cooper had willed everything to him; that nothing was going to Ed Stowe. He said that he did not have it in black and white, but that he had been told by the white folks that he did not need it in black and white.

The foregoing evidence was properly submitted to the jury upon the first issue. Its credibility and probative value was for the jury to determine, as the court carefully instructed them.

The contentions of both propounder and caveator, upon all the evidence pertinent to the first issue, were fully and clearly stated in the charge of the court. We find no error, prejudicial to the propounder, in the instructions to the jury upon this issue. It is not material to the disposition of this appeal, to consider or decide assignments of error pertinent to the issues which under the instructions of the court were not answered by the jury. The answer of the jury to the first issue is sufficient to support the judgment, which must be affirmed.

As the jury has found that the signature of Mary Cooper on the paper-writing dated 4 October, 1927, and propounded by Charlie Williams, as her last will and testament, is a forgery, we do not discuss the question as to whether or not this proceeding is a collateral attack upon the probate and record of the last will and testament of Mary Cooper, under which E. P. Stowe, the caveator in this proceeding is the sole legatee and devisee of all her property. If the paper-writing dated 4 October, 1927, and propounded in this proceeding as her last will and testament, had been probated, it could not have been construed as a codicil to the will probated on 26 October, 1927. It would have had the effect of vacating and rendering void the said will.

Whether a will which has been duly probated in common form and recorded as the last will and testament of the testator can be vacated and rendered void by the probate of another paper-writing, subsequently executed, by the testator, as his last will and testament, is not presented by this appeal. This question would have been presented for our decision, if the jury had answered the issues in accordance with the contentions of the propounders and judgment had been rendered accordingly.

No error.

STACY, C. J., dissents.

J. G. KUYKENDALL v. INDEPENDENT COACH LINE, INC., AND THE TOWN OF CANTON.

(Filed 19 December, 1928.)

Negligence — Contributory Negligence — Persons Injured in General — Bus Lines.

Where a passenger on a crowded bus rides on the fender of the bus with the expressed or implied consent of the company, and places himself so as to obstruct the line of vision of the driver, and this proximately causes a collision in which he is injured, his contributory negligence will bar his recovery.

APPEAL by plaintiff from *Deal, J.,* at May Term, 1928, of HAYWOOD. Affirmed.

This was a civil action for actionable negligence, brought by plaintiff against defendants, for a personal injury alleged to have been received by him while he was a passenger on a trailer or car, operated by an agent of the defendant, Independent Coach Line, Inc., which trailer or car collided with a tar-kiln or tank owned by the defendant, town of Canton, and which was being used in the repair of certain streets in said town.

At the close of plaintiff's evidence each of the defendants moved for judgment as in case of nonsuit. C. S., 567. The court below allowed the motions and the plaintiff excepted, assigned errors and appealed to the Supreme Court.

Hannah & Hannah and W. R. Francis for plaintiff.
Morgan & Ward and Alley & Alley for Independent Coach Line, Inc.
S. M. Robinson for town of Canton.

PER CURIAM. It was in evidence that on 30 March, 1927, plaintiff was riding on the fender of a trailer to a bus of the Independent Coach Line, Inc., driven by Albert Reeves, going from Canton to Red Hill. The regular bus was crowded and the trailer was crowded. Plaintiff paid the regular fare and got on the front fender of the car, with his feet on the bumper. The driver of the trailer had driven the car about 30 feet when it struck the tar-kiln or tank, owned by the town of Canton, used in the repair of its streets, which was 6 or 8 feet from the sidewalk and in the street, throwing boiling tar over plaintiff to his serious damage. It was day time, between 11 and 12 o'clock. The driver was sitting on the left-hand side of the trailer. Plaintiff was not directly in front of him, but a little to the side. Plaintiff's position obstructed the driver's vision on one side. The tar-kiln was struck a little to plaintiff's side.

Albert Reeves, a witness for plaintiff, testified, in part: "Jim Kuykendall (the plaintiff), was on the left front fender and a fellow from Georgia on the right front fender. With these two men on the fender I could not see an object up the street unless it would be right in the center; I couldn't see on the side for Mr. Kuykendall was on the fender and the other man on the other. . . . My taxi was full and I heard somebody tell Kuykendall, 'You boys will have to take a fender,' and they said 'All right,' and climbed on the fender. . . . I could see right across the radiator; the left part of the bumper where Kuykendall was, was where it hit. . . . I couldn't see from the rear across and couldn't see over the left wheel. . . . If I had seen it at all I would have stopped, or would have passed on the right-hand side of it, but I couldn't see him. . . . There was plenty of room on the left to pass if I could have seen him. I couldn't see him because that fellow was in front and he pulled over there; I am speaking of Mr. Kuykendall. The reason I couldn't see him was because he was in front of me on the fender. If he hadn't been on the front fender I think I could have easily seen the tar-kiln. . . . The only statement that I made in court before Judge Mease was that I had a man on the fender and couldn't see the tar kettle."

The collision was in broad day light. The kiln could easily have been seen, like an automobile, or any other vehicle, in the street. It was the duty of the driver of the trailer, to use due care and keep a proper lookout. It was not negligence, as a matter of law, in plaintiff riding on the fender if he had express or implied permission, especially when the trailer or car was crowded; but when he got on the fender, in front of the driver and obstructed his view, which he knew, or in the exercise of ordinary care ought to have known, under the facts and circumstances of this case, we are of the opinion that he was guilty of contributory negligence. On all the evidence he put himself in the place that obstructed the driver's view, and this was the proximate cause of his injury. The judgment of nonsuit in the court below is

Affirmed.

JONATHAN PHILLIPS v. G. N. PENLAND, EXECUTOR.

(Filed 2 January, 1929.)

1. **Account, Action On—Nature of Mutual, Open, and Current Account—Running Account—Contracts—Services Rendered.**

   An indefinite promise to pay intermittently from time to time for such services as may be rendered by one party to another is not a mutual, open, and current account with reciprocal demands between the parties within the perview of C. S., 421.

2. **Executors and Administrators—Allowance and Payment of Claims—Claims for Services Rendered Decedent—Limitation of Actions.**

   Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an action against the administrator of the deceased promissor for the value of such services: *Held,* a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made.

CIVIL ACTION, before *MacRae, Special Judge,* at April Term, 1928, of MACON.

H. P. Penland died about October, 1926, and the defendant was duly appointed executor of the estate of said deceased on 12 November, 1926.

The plaintiff alleged that in 1916, the deceased suffered an injury, and as a result thereof was unable to look after her farm, and that said deceased employed the plaintiff to wait upon her and to look after her farm with the understanding and agreement that he should be paid for his services. The plaintiff and the deceased were brother and sister. The evidence tended to show that the plaintiff rendered services to the deceased in building a tenant house, hauling wood, covering a crib, and otherwise taking care of the deceased and managing her farm.

The nature of the contract between the parties was thus described by a witness: "I heard her (deceased) say a number of times if he would take care of things and see to them, that they could not themselves, they were unable to—that he would be well paid for it." There was further testimony to the effect that in 1919 the plaintiff bought a cotton planter from the deceased, agreeing to pay therefor the sum of $25.00, that he paid $15.00 and the deceased allowed the balance of $10.00 as a credit on the account for services. In 1921 there was a payment of $3.00 made by the deceased to the plaintiff, and in 1925 a payment of $40.00. The circumstances under which these payments were made do not appear.

The defendant denied that the plaintiff had performed services for his testatrix, and also pleaded the statute of limitations.

Two issues were submitted involving the value of plaintiff's services and the statute of limitations. The jury answered the first issue "$1,300," and the second issue "No."

From judgment upon the verdict the defendant appealed.

George B. Patton for plaintiff.
R. D. Sisk and Edwards & Leatherwood for defendant.

BROGDEN, J. The judge charged the jury as follows: "The court charges you that if you find by the greater weight of evidence that the deceased, Mrs. Penland, in 1925, paid the sum of $40.00 to the plaintiff, and that such payment was made with the intention and understanding between them that the payment was to be credited by the plaintiff upon a running account between plaintiff and Mrs. Penland for services rendered to Mrs. Penland by the plaintiff, and that such payment was of such a nature and made in such a way as to imply in law that the debtor acknowledged the debt as still existing, and implied a promise unequivocally to pay the same, then you should answer the issue No. If you find, on the other hand, that such payment was not made in recognition to pay the balance of any existing running account, then you answer the issue Yes."

The plain effect of the foregoing instruction was to instruct the jury that if in 1925, $40.00 had been paid on a running account, then the whole account from 1916 to the death of the deceased in 1926 would constitute a valid claim, as the statute of limitations in such event would not operate as a bar. The instruction so given the jury overlooked the distinction between a running account and a "mutual, open and current account, where there have been reciprocal demands between the parties," etc., as defined by C. S., 421. This section has been construed in many cases, notably, *Hollingsworth v. Allen,* 176 N. C., 629, 97 S. E., 625; *McKinnie Bros. v. Wester,* 188 N. C., 514, 125 S. E., 1.

What then is the effect of the payment of $40.00 made in 1925?

The contract alleged by the plaintiff contemplated indefinite and continuous services with no fixed time for payment and with no agreement as to what services should be performed or the value thereof. Hence the agreement is governed by the principle of law announced in *Miller v. Lash,* 85 N. C., 52, as follows: "We are of opinion, then, that the unexplained fact of labor performed and extending over a series of years raises no implication that payment is to be made at any fixed period, unless perhaps annually, as controlled by a prevalent custom appropriate to the kind of service and entering into the contract, when it so appears in evidence. The implied promise is to pay for services as they are rendered, and payment may be required whenever *any are rendered;* and thus the statute is silently and steadily excluding so much as is beyond the prescribed limitation." When the statute of limitations is pleaded the burden is on the plaintiff to show that his claim is still alive and valid. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32; *Jackson v. Harvester Co.,* 188 N. C., 275, 124 S. E., 334.

The evidence discloses that no payment was made by the deceased to the plaintiff from the year 1921 until the $40.00 was paid in 1925. Thus, more than three years had elapsed between the payments. The payment of $40.00, made in 1925, nothing else appearing, had the legal effect of preventing the bar of the statute of limitations against the most precarious claim then existing, that is, the one for 1922, and of prolonging its enforceability for three years beyond the date of such payment. This principle was announced in *Hewlett v. Schenck,* 82 N. C., 234, in the following language: "So a partial payment, though the evidence need not be in writing, being *an act* and not a mere declaration revives the liability because it is deemed a recognition of it and an assumption anew of the balance due. But if at the time such payment is made the presumption arising from the unexplained fact is disproved by the attending circumstances or other sufficient evidence of a contrary intent, the payment will not have such effect." *Cone v. Hyatt,* 132 N. C., 810, 44 S. E., 678; *Supply Co. v. Dowd,* 146 N. C., 191, 59 S. E., 685; *French v. Richardson,* 167 N. C., 41, 83 S. E., 31. The result is that the payment of $40 in 1925 prevented the bar of the statute of limitations as to all claims to a corresponding date in 1922. Moreover, as the services were continuous, such payment constituted a legal recognition of all claims within the statutory period of three years, that is from said corresponding date in 1922. Therefore, as there is no express contract, the plaintiff is entitled under the law to recover the reasonable value of all services rendered from said date in 1922, subject, nevertheless, to credit for such amount as the deceased paid during said period of liability. *Wood v. Wood*, 186 N. C., 559, 120 S. E., 194.

New trial.

AMERICAN TRUST CO., RECEIVER, v. W. L. JENKINS ET AL.

(Filed 2 January, 1929.)

1. **Reference—Nature, Grounds, and Order of Reference—Power of Trial Court to Set Aside Order of Compulsory Reference.**

   Where the trial judge has ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. C. S., 577.

2. **Same—Exceptions to Order of Reference—Trial By Jury.**

   A party to an action waives his right to a trial by jury by not excepting to the order of compulsory reference, and after such exception, by not tendering proper issues arising under his exceptions, or by not otherwise preserving his right thereto.

CIVIL ACTION, before *Harding, J.*, at March Special Term, 1928, of MECKLENBURG.

The plaintiff as receiver for the Security Savings Bank instituted an action against the defendants, who were stockholders in said Savings Bank, to compel said stockholders to pay to said receiver their stock liability. Pleadings were filed by the defendants, and at the April Term, 1927, Judge Finley, finding that the cause "would require the taking of a long account," referred the case to a referee. There was no objection or exception to the order of reference and no demand for a jury trial. Thereafter, the parties appeared before the referee who declined to permit the introduction of certain books and records offered by the plaintiff, and further declined to permit the plaintiff to introduce certain pertinent evidence upon the questions involved in the suit. The referee made his report, and exceptions were filed by the plaintiff, who requested the court "to set aside the referee's report and the order of reference and to proceed with the trial of this cause." No issues, however, upon the exceptions were tendered by the plaintiff. Thereupon, the trial judge found as a fact "that the referee's actions were sincere and honest, but the court being of the opinion that the exclusion of the evidence and the books was erroneous, and that the books should have been admitted in evidence, under testimony of witnesses, for identification. It is therefore ordered that the report of the referee be, and the same is set aside and the order of reference heretofore made is revoked to the end that this cause may be set down for trial by a jury at such day as plaintiff and defendant may agree upon, at the convenience of the court."

To the foregoing judgment the defendants appeal, assigning error.

Whitlock, Dockery & Shaw for plaintiff.
C. A. Cochran and John M. Robinson for defendant.

BROGDEN, J. Can a trial judge revoke an order of compulsory reference, made without objection or exception, and set the cause for trial by a jury?

The principle of law applicable to the facts disclosed by the record was stated in *Rogers v. Lumber Co.,* 154 N. C., 108, 69 S. E., 788, as follows: "When there is a consent reference the court cannot set aside the method of trial agreed upon by the parties. It can affirm, modify, or disapprove the report of the referee or can rerefer the case. When it is a compulsory reference, if either party reserves his right to a jury trial, in the manner pointed out in *Driller Co. v. Worth,* 117 N. C., 515, the judge can set aside the reference and submit the case to the jury upon proper issues." The question immediately arises: "Did either party reserve his right to a jury trial," in the manner pointed out in *Driller Co. v. Worth,* 117 N. C., 515? An examination of that case discloses that a party, in order to preserve his constitutional right of trial by jury, must cause his objection to be tendered of record when the compulsory order of reference is made. And even if this is done, he will still waive his right of trial by jury by failing to assert such right in his exceptions to the referee's report. *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16; *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419. In the latter case the rule was thus stated by *Stacy, C. J.:* "When a compulsory reference is ordered, the party who would preserve the right to have the issues found by a jury, must duly except to the order of reference; and, upon the coming in of the referee's report, if it be adverse, he must file exceptions thereto in apt time, properly tender appropriate issues, and demand a jury trial on each of the issues tendered, and, if the referee's report be in his favor, he must seasonably tender issues on the exceptions, if any, filed to the report by the adverse party, and demand a jury trial thereon, or else the right to have the controverted facts determined by a jury will be deemed to be waived, so far as he is concerned."

Does the failure of a party to except to the order of compulsory reference or to preserve his right of trial by a jury, as pointed out in the decisions, deprive the trial judge of power to revoke such order of reference? This question was definitely answered in the case of *Smith v. Hicks,* 108 N. C., 249, 12 S. E., 1035. Therein, a compulsory reference was ordered. No exception was noted to the order. Thereafter, the referee filed a report to which the plaintiff filed an exception and demanded a jury trial. At a subsequent term the defendant moved to confirm the report. The plaintiff insisted upon submitting an issue to the jury, asserting that the reference was compulsory, and hence the court had no power in such event to withdraw the case from the jury. The court ruled with the plaintiff and submitted an issue to the jury and the defendant excepted. This Court said: "The nature of the action was such as to require an account to be taken. To that end, the court made the order of reference in the presence of the parties and their counsel. In the absence of objection, the reasonable and just implication and inference was that they assented to and sanctioned it. That they did, and that such a reference is made by consent, is clearly settled by numerous decisions of this Court. Moreover, such consent is in effect a waiver of the right to a trial by jury."

In the case at bar the referee misconceived his duty. C. S., 577, requires referees to receive and preserve the testimony "of all witnesses on both sides," and to file the testimony with his report. While the referee has power to rule upon the competency of evidence offered by a party or to exclude such testimony from his consideration in making up his report, nevertheless this power must be exercised in subjection to the ultimate right of the parties to have the trial judge to "review the report, and set aside, modify or confirm it in whole or in part," etc. *Mills v. Ins. Co., ante,* 223. The trial judge cannot intelligently review the report, modify or confirm it, unless the evidence offered by the parties is before him. If a referee refuses to comply with the order of reference, or otherwise fails to perform the duties contemplated by law, the trial judge has the power to remove him, but under the authorities recognized and applied in this jurisdiction, the trial judge has no power to revoke an order of reference under the circumstances disclosed by this record.

Reversed.

STATE v. CHARLEY FOSTER.

(Filed 2 January, 1929.)

Intoxicating Liquor — Possession — Constructive Possession — Presumptions.

The mere fact that a pint of intoxicating liquor was found in a basement of a building leased by the defendant, with evidence that the basement was not actually or constructively in the possession of the defendant, is not alone sufficient to raise the presumption of the unlawful possession by the defendant of such liquor, and an instruction to that effect is reversible error to the defendant's prejudice.

CRIMINAL ACTION, before *Moore, J.*, at July Term, 1928, of HAYWOOD.

The defendant was indicted for violation of the prohibition law. At the close of the evidence the solicitor announced that he would ask for a conviction on only two counts in the bill, to wit, sale and possession of intoxicating liquors. The jury returned a verdict of not guilty as to selling whiskey but guilty under the count charging possession. Thereupon the defendant was sentenced to serve a term of six months on the roads.

The witness for the State, who made the search, testified as follows: "I found a pint of whiskey in the basement under his store, and it was buried in the dirt. . . . I found a number of empty bottles and a number of places where they had been scratched out that day. . . . I didn't find any whiskey in his house. I found this in the basement. I don't know who the building belongs to and I don't know if he is in possession of the basement. You enter this basement from the outside and not from the store. You enter it from the side of the building, and there is a trail from the front door to the basement door around the side of the building. From the room where he conducts his business you can't get into the basement. . . . As well as I remember there is an old cook stove in that basement, but I didn't see any other rubbish and stuff in there. I don't know if Charley Foster has any goods or merchandise that he sells down there, it had been used a pretty good deal that day after the rain. The door was locked and I don't know who had been in there. . . . I pulled the lock off, just took it and jerked it two or three times and it came unlocked."

From the judgment pronounced the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Morgan & Ward for defendant.

BROGDEN, J. The following instruction was given the jury: "The court instructs you that the defendant being there in possession of that house is a presumption that he was in possession of the whole building. Until that presumption is rebutted or removed that presumption is against him. The State having satisfied you beyond a reasonable doubt that he was in possession of that store room, then the presumption is that he was in possession of the whole building. The State does not have to prove negative testimony, does not have to prove that somebody else owns the basement or has charge of it, but the law presumes that he, being in possession of the store would be in possession of the entire building."

The question of law presented by the foregoing instruction is this: "Does the law presume that the lease of a store room necessarily includes the basement and other portions of the building?"

It is not necessary in order to decide this case to ramble in the legal field of presumptions. There is in the North Carolina Law Review of June, 1927, an interesting and instructive article on this subject. Dean McCormick, of the University Law School, the author, declares: "One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.' A Missouri lawyer said that presumptions were 'bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts.'"

The law does not presume the terms of a lease, unless, of course, the lease is made under statutory authority and purports to comply therewith. The general principle established by the decisions of the courts is to the effect that a lease covers the property actually described therein, together with such other property as may be necessary for the beneficial use and enjoyment of the property leased. 36 C. J., 29. *Florgus Realty Corporation v. Reynolds,* 187 N. Y. S., 188; *Goldsmith v. Traveler Shoe Co.,* 109 N. E., 394.

The evidence does not disclose that the defendant was in either actual or constructive possession of the basement of said store, nor does it appear what the terms of the lease were. Neither does it appear that the use of the basement was reasonably necessary for the beneficial enjoyment of the store.

Under these circumstances the charge of the trial court was too broad, and the exception of the defendant thereto is sustained.

New trial.

R. M. PATTERSON, TRADING AS PATTERSON & DEVERBRE, v. L. BLOMBERG AND ASHEVILLE SALVAGE COMPANY, INC.

(Filed 2 January, 1929.)

1. **Usury — Construction of Contracts and Transactions in Regard to Usury.**

A loan secured by a broker is not tainted with usury as between the broker and the proposed borrower by reason of the fact alone that the broker procured the loan from a bank upon consideration that the bank receive a part of the commissions when the bank charged the borrower only the lawful rate of interest.

2. **Brokers—Actions for Commissions.**

Where the only question in an action to recover a broker's commission is a denial of any contract made between the parties, without allegations that the alleged contract was not performed by plaintiff in accordance with its terms, or that the plaintiff was entitled to recover only his costs incurred in procuring the loan, the defendant may not complain that there was error in the trial court's not submitting to the jury these contentions.

APPEAL by defendants from *Moore, J.*, at May Term, 1928, of BUNCOMBE. No error.

Action to recover commissions due plaintiff as a broker, for procuring a loan of money for defendants, pursuant to the terms of an express contract.

The issue submitted to the jury was answered as follows: "In what amount, if any, are defendants indebted to plaintiff? Answer: $2,250."

From the judgment on the verdict, defendants appealed to the Supreme Court.

A. Hall Johnson and W. A. Sullivan for plaintiff.
Weaver & Patla and R. R. Williams for defendants.

CONNOR, J. This is an action upon a special contract, as alleged in the complaint. It is alleged that plaintiff fully performed said contract, and that defendants have failed and refused to pay to plaintiff the commissions due in accordance with its terms. Defendants deny the contract, but admit that they refused to accept the money and to close the loan by the execution of the notes and deed of trust required by the lender of the money.

Evidence on behalf of plaintiff tended to show that on or about 14 February, 1927, plaintiff, at the request of defendant, L. Blomberg, acting for himself and for his codefendant, as a broker, undertook to procure for defendants a loan for $45,000, on five years time; and that defendants agreed to pay to plaintiff for his services in procuring said loan five per cent of the amount of the loan. This contract was not in writing; it superseded previous contracts between the parties, which were in writing. By these contracts, plaintiff had undertaken to procure loans for larger sums than $45,000, but had been unable to do so, upon the security offered by defendants. After failure to procure loans for the larger sums, plaintiff undertook to procure a loan for $45,000, pursuant to the contract alleged in the complaint.

There was evidence tending to show that plaintiff procured the loan for $45,000, and notified defendants that he was ready to close the loan upon the execution of the notes and deed of trust required by the lender of the money. Defendants declined and refused to execute the notes and deed of trust, or to accept the money procured for them by plaintiff. They made no objection to the form of the papers, or to the terms upon which the loan was to be made. They denied that they had requested plaintiff to procure the loan for them. There was evidence tending to show that subsequent to 14 February, 1927, defendants procured a loan from another source for a larger sum than $45,000.

There was evidence on behalf of defendants in contradiction of the evidence for the plaintiff tending to show the contract as alleged by plaintiff. All the evidence was submitted to the jury under instructions of the court which are free from error. Defendants' assignments of error based upon exceptions to the refusal of their motion for judgment as of nonsuit, and to instructions in the charge to the jury are not sustained. We find no error in the refusal of the court to give the instructions requested by defendants.

The agreement by the plaintiff to divide the commissions to be received by him with the bank, from which plaintiff procured the loan, did not render the transaction between plaintiff and defendants usurious and therefore void. The bank did not charge or reserve for the use of the money interest at a greater rate than six per centum per annum. If defendants had closed the loan, and accepted the money procured for them by plaintiff, as they had agreed to do, they would not have been required to pay more than legal interest on the loan.

Defendants' contention that the evidence on behalf of the plaintiff failed to show a contract, for that all the terms upon which the loan was to be made were not included in the agreement, cannot be sustained. Their defense in this action is based solely on their denial of the contract as alleged in the complaint. They do not complain of the terms upon which the loan was procured by plaintiff. Nor do they allege that plaintiff was entitled, under the contract, to recover only expenses incurred in the effort to procure the loan.

The issue has been found against defendants by the jury. We find no error and the judgment must be affirmed.

No error.

SALLIE K. YOUNG, ADMINISTRATRIX, v. E. A. WOOD & COMPANY.

(Filed 2 January, 1929.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Safe Place to Work—Instructing and Warning Servant—Nonsuit.**

Where the plaintiff's intestate was employed to work in the erection of a concrete pier of a bridge across a stream, and an action is brought to recover damages for his alleged wrongful death, evidence tending to show that the intestate had been working on the erection of this pier several days before it was high enough to be dangerous from the passing over it of heavy buckets of concrete, and that he was ordered to work on top of the pier without being warned of the danger under the changed circumstances from the passing of these buckets of concrete over the higher pier, and he was struck and killed by one of these buckets, is sufficient upon the actionable negligence of the defendant upon the appropriate issue, and defendant's motion as of nonsuit is properly denied.

2. **Same—Contributory Negligence of Servant—Assumption of Risk—Burden of Proof.**

The defendant in an action to recover damages for a wrongful death has the burden of proving his defense of contributory negligence and assumption of risks.

3. **Master and Servant—Liability of Master for Injuries to Servant—Assumption of Risk.**

Where the servant is killed while acting under the instruction of the master he is not held to assume the risks of existent dangers of which he is not aware.

4. **Death—Actions for Wrongful Death—Damages—Mortuary Tables—Evidence.**

The statutory mortuary tables is but evidentiary and not conclusive evidence of the expectancy of life at the various ages stated. C. S., 1790.

APPEAL by defendants from *McElroy, J.*, at February Term, 1928, of MCDOWELL. No error.

Action to recover damages for the wrongful death of plaintiff's intestate.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff's intestate, W. H. Young, injured and killed by the negligence of defendants, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff's intestate, by his own negligence, contribute to the injury which resulted in his death, as alleged in the answer? Answer: No.

"3. Did plaintiff's intestate in his employment assume the risk of the injury as alleged in the answer? Answer: No.

"4. What damages, if any, is plaintiff entitled to recover? Answer: $23,500."

From judgment on the verdict, defendants appealed to the Supreme Court.

W. R. Chambers, J. W. Ragland and W. T. Morgan for plaintiff.
Winborne & Proctor and Pless & Pless for defendants.

CONNOR, J. During the year 1927, defendants were engaged in the construction of a concrete bridge across Green River, near Saluda, North Carolina, under a contract with the State Highway Commission. Plaintiff's intestate, W. H. Young, was employed by defendants as a carpenter to work on and about said bridge. While engaged in the performance of his duties as an employee of defendants, the said W. H. Young sustained injuries, which resulted in his death. Plaintiff alleges that said injuries, and the death of her intestate resulting therefrom, were caused by the negligence of defendants in failing to exercise due care to provide for him a reasonably safe place to work. Defendants deny this allegation, and plead in bar of plaintiff's recovery of damages by this action, contributory negligence and assumption of risk. From the judgment on the verdict, establishing defendant's liability and assessing the damages which plaintiff is entitled to recover, defendants have appealed to this Court, assigning errors based upon exceptions aptly taken during the trial. We have examined the several assignments of error relied upon by defendants, together with the brief filed in this Court on their behalf. Neither of the assignments of error can be sustained.

The essential facts, as shown by all the evidence, are as follows:

At about 7:30 a. m. on Monday, 10 October, 1927, plaintiff's intestate was ordered and directed by the superintendent of defendants, in charge of the construction of said bridge, to go with other employees of defendants up on a pier in the river to remove therefrom certain forms into which concrete had been poured. Within a few moments after said intestate had reached the top of said pier, he was struck by a bucket, loaded with concrete and weighing about 1,500 pounds. He was knocked off the pier, and fell into the river, a distance of about 100 feet, thereby sustaining injuries which caused his death. The bucket which struck deceased and knocked him off the pier, was operated by defendants by means of a cable to which it was attached, for the purpose of conveying concrete and other material from the bank of the river to the bridge which was under construction. The cable to which the bucket was attached ran from one bank of the river to the other, passing over the pier. The pier had been constructed in sections, each section being 14½ feet in height. The last section of the pier had been constructed on Friday preceding the Monday on which deceased was killed. The pier, after the construction of this last section, was about 100 feet high. Prior to the construction of the last section, the bucket passed over the pier at a sufficient distance not to endanger employees of defendant at work on its top. After its construction, due to the sagging of the cable, caused by the weight of the loaded bucket, employees of defendants at work on the top of the pier were exposed to the danger of being struck by the bucket as it passed over the pier. Plaintiff's intestate had not been on the top of the pier since the last section was constructed on Friday, raising the height of the pier 14½ feet. There was evidence tending to show that plaintiff's intestate was not instructed at the time he was ordered and directed to go up on the pier to work, as to the changed conditions which made the place at which he was to work dangerous. There was evidence to the contrary, the superintendent testifying that he warned said intestate of the danger from the bucket, at the time he ordered and directed him to go up on the pier. The evidence pertinent to the first issue was properly submitted to the jury, under instructions which are free from error.

We find no error in the instructions with respect to the second and third issues. Assignments of error based on exceptions to these instructions cannot be sustained. The jury was properly instructed that the burden upon these issues was upon the defendants. It may be doubted whether there was any evidence tending to show that deceased contributed to his injuries and death by his negligence. It might well have been held that plaintiff's intestate did not assume the risk, of being struck and knocked off the pier by the bucket which passed over the place where he was required to work, from time to time. It could not be held that plaintiff's intestate assumed a risk of which he had no knowledge, when in obedience to defendants' orders he went to the place at which he was directed by defendants to work. There were risks which were and must have been obvious to plaintiff's intestate. His injuries were not caused, however, by any of these risks, which it may well be held that he assumed, when he went up on the pier to work.

There was no error in the instructions relative to the fourth issue. The instruction with respect to the probative value of the Mortuary Table to which defendants excepted, cannot be held as error. The jury was properly instructed that this table, as set out in C. S., 1790, is not conclusive, but only evidentiary. *Odom v. Lumber Co.,* 173 N. C., 134, 91 S. E., 716.

As we find no error on this record, the judgment must be affirmed. It is so ordered.

No error.

STATE v. SIBBALD SMITH.

(Filed 2 January, 1929.)

1. **Criminal Law—Judgment—Suspended Judgments—Opportunity to Be Heard.**

   Where the defendant has been convicted of slandering a virtuous woman and judgment has been suspended upon certain conditions, before the suspended judgment can be put into execution for the failure of defendant to perform the conditions thereof he must be given an opportunity to be heard, and on appeal the judge should find the facts upon which he acted in putting the judgment into effect.

2. **Criminal Law—Judgment—Cost Not a Part of Punishment.**

   The taxing the cost in a criminal action is not a part of the punishment for the offense committed, and is regulated by statute. C. S., 1268, 1270.

CRIMINAL ACTION, before *Moore, J.,* at August Term, 1928, of SWAIN.

At the March Term, 1927, of the Superior Court of Swain County the defendant was convicted of slander of an innocent and virtuous woman, and the following judgment entered: "It is the judgment of the court that the defendant be confined in the common jail of Swain County for a period of four months and pay the costs of this action. Capias on this sentence not to issue on the express condition that he will not violate any of the laws of the State, and particularly not to talk about young girls in any way except complimentary remarks, and on the further condition that he be of good behavior toward all citizens of North Carolina and engage in some constant occupation regularly, and he is allowed until the first day of next term of Swain County Superior Court in which to pay the cost."

At the August Term, 1928, the judge issued a capias for defendant and entered the following judgment: "This cause coming on to be heard, and it appearing to the court that the defendant has failed to comply with former judgment in this case in that he failed to pay the costs as required in the judgment; It is therefore ordered that the judgment be enforced and the defendant be sent to jail for four months to carry out said judgment."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moody & Moody, W. G. Hall and McKinley Edwards for defendant.

BROGDEN, J. It does not appear from the record that the defendant was offered an opportunity in open court to be heard upon the question as to whether he had violated the conditions upon which the original judgment was suspended. Neither is there evidence or finding of fact to the effect that any of said conditions had been violated.

The exception of the defendant to the judgment appealed from is sustained. *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Phillips,* 185 N. C., 614, 115 S. E., 893; *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436.

Costs constitute no part of the punishment of the defendant. *S. v. Crook,* 115 N. C., 760, 20 S. E., 513.

Liability for costs in criminal cases is regulated by C. S., 1268-1270. These sections provide in substance that a defendant upon failing to pay costs may be imprisoned "until the costs shall be paid, or until he shall otherwise be discharged according to law."

Error.

L. L. FARRIS v. S. C. HENDRICKS, D. H. COX, L. H. COX, R. F. COX, TRADING AS COX LUMBER CO.; SPENCER LUMBER COMPANY, WIGGINS LUMBER COMPANY, R. T. HOOD, A. E. WOLTZ, JOHN S. JENKINS AND J. W. GIBSON.

(Filed 2 January, 1929.)

1. **Judgment Lien—Homestead.**

   A duly docketed judgment is a lien on the lands of the judgment debtor, C. S., 614, but is subject to the homestead interest in the lands as provided by Const., Art. X, sec. 2.

2. **Homestead—Transfer or Incumbrance—Requisites—Private Examination of Wife.**

   Where there is a homestead right in land, Cons., Art. X, sec. 2, the homesteader may alienate the same only with the joinder and private examination of the wife. Const., Art. X, sec. 8.

3. **Homestead—Nature, Acquisition, and Extent—Property Constituting Homestead—Mortgages.**

   Where a mortgage on land is foreclosed and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the Constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived.

4. **Homestead—Nature, Acquisition, and Extent—Rights of Homesteader—Judgments.**

   Where the judgment debtor has executed a mortgage on his lands with the privy examination of his wife after the judgment has been docketed against him and the mortgage has been foreclosed and a sum of money in excess of that required to pay off the mortgage debt, and within the one thousand dollar exemption allowed by the Constitution, is obtained in the foreclosure sale and the surplus has been deposited in the office of the clerk of the court, which is the subject of the action between the judgment creditor and the judgment debtor claiming his homestead therein: *Held,* the latter is not entitled to the present worth of the *corpus* of the funds in the clerk's hands computed under the expectancy of life under the mortuary table, but only the interest thereon is available to him or to those who may claim the homestead under the provisions of the Constitution, Art. X, sec. 2.

5. **Appeal and Error—Review—Scope and Extent in General.**

Where the cause of action has been exclusively tried upon one theory in the Superior Court, the Supreme Court on appeal will determine it upon that theory alone.

APPEAL by plaintiff from *Harding, J.,* and a jury, at September Term, 1928, of GASTON. No error.

It was in evidence that (1) The defendant, Spencer Lumber Co., had a judgment for $208.11, duly docketed in the Superior Court of Gaston County, on 11 July, 1926. (2) That plaintiff owned a house and lot in Belmont, Gaston County. He and his wife executed to defendant, R. T. Hood, a mortgage for $700, which was recorded 31 July, 1926, in Book 186, p. 390, registry for Gaston County. R. T. Hood advertised and sold the house and lot under the mortgage on 3 September, 1927, and made a deed dated 10 October, 1927, to defendant J. W. Gibson. The land at the sale brought $1,296.75. The plaintiff was 40 years old on 24 September, 1927, and had a wife and six children, the youngest being three years old. S. C. Hendricks is the clerk of the Superior Court of Gaston County. J. W. Gibson paid the purchase price to R. T. Hood, mortgagee, who retained his debt, and on 17 December, 1927, paid the balance in excess of the mortgage $509.49 to said clerk.

Plaintiff duly demanded his homestead in the excess after paying the mortgage.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did plaintiff own house and lot set out in the complaint? Answer: Yes.

"2. What sum was paid to S. C. Hendricks, clerk of the court, by mortgagee Hood? Answer: $509.49.

"3. What was the age of L. L. Farris at the time of the said payment? Answer: 40 years.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant, S. C. Hendricks? Answer: The plaintiff is not entitled to recover the *corpus* of the fund of $509.49, but is entitled to have the income therefrom paid to him by the clerk of the Superior Court as it accrues from year to year during the life of the plaintiff, and at his death, to the wife of the plaintiff, if she survives him, and after her death until the youngest child arrives at the age of 21 years, if the youngest child should become 21 years of age after the death of plaintiff Farris and after the death of the plaintiff's wife."

To the findings of the fourth issue as above, under the peremptory instruction of his Honor, the plaintiff duly excepted and assigned error.

The following judgment was rendered in the court below: "This cause coming on to be heard before his Honor, Wm. F. Harding, judge presiding, and a jury, and the jury having answered the issues as appear of record: It is therefore considered, ordered and adjudged that the plaintiff is not entitled to recover the *corpus* of the fund of $509.49, but is entitled to have the income therefrom paid to him by the clerk of the Superior Court as it accrues from year to year during the life of the plaintiff, and at his death to the wife of the plaintiff if she survives him, and after her death until the youngest child arrives at the age of 21 years; if the youngest child should become 21 years of age after the death of plaintiff Farris and after the death of the plaintiff's wife, that the costs of the action be paid out of funds in the hands of the clerk."

Plaintiff tendered a judgment for $409.82, the present cash value or worth of his homestead of $509.49, based on the table of expectancy. Plaintiff excepted to the judgment as rendered, assigned error and appealed to the Supreme Court.

Geo. W. Wilson for plaintiff.
Geo. B. Mason for defendant Spencer Lumber Co.

CLARKSON, J. The plaintiff had a house and lot in Belmont, Gaston County. The defendant, Spencer Lumber Co., obtained a judgment for $208.11 and duly docketed same in the Superior Court of Gaston County. This was a lien on plaintiff's land. C. S., 614. Thereafter plaintiff and his wife executed a mortgage on the house and lot. It was sold to pay the mortgage debt and there was an excess over and above the mortgage of $509.49, which was paid to the clerk of the Superior Court of said county.

The Constitution of North Carolina, Article X, section 2, is as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

Article X, section 8: "Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

Is plaintiff, under the mortuary tables, C. S., 1790, entitled to the present worth or cash value in $509.49, said fund representing his homestead in a house and lot, excess after paying the mortgage on the house and lot? We think not. Plaintiff cites *Wilson v. Patton,* 87 N. C., 318; *Leak v. Gay,* 107 N. C., 468-483; *Montague v. Bank,* 118 N. C., 283; *Duplin County v. Harrell,* 195 N. C., 445; *Cheek v. Walden,* 195 N. C., 752.

In the *Montague case, supra,* it is said: "Should the land sell for more than the mortgage debt, the surplus money is still realty, in which the debtor can assert his homestead, as against any execution. *Hinson v. Adrian,* 92 N. C., 121."

By a careful perusal of the cases cited by plaintiff, it will be noted that they relate to the constitutional right of the debtor to the homestead in the equity of redemption, or the proceeds in the surplus after sale under mortgage or deed of trust, being real estate, when duly demanded by the homesteader and not waived. These cases must be read in the light of the facts of the particular case. In the *Wilson* and *Leak cases, supra,* there are *dicta* sustaining plaintiff's contentions. The *Wilson case* was cited in the *Duplin County case, supra,* on the aspect of the homesteader claiming his homestead in certain funds and the proceeds from the sale of the homestead. See *Gulley v. Thurston,* 112 N. C., at p. 112-13.

In 32 A. L. R., Anno., p. 1334, it is said: "In *Gulley v. Thurston* (1893), 112 N. C., 192, 12 S. E., 13, the Court, in holding that a judgment lien is superior to a subsequently registered mortgage on land held by the debtor, which is over and above the statutory homestead limit, said: 'The question which is presented by this appeal is, which has a superior lien on land of the debtor outside of his allotted homestead—his judgment creditor whose judgment has been duly docketed, or his mortgagee whose mortgage was executed and registered after the docketing of the judgment? A bare statement that under the law (Code, sec. 435, C. S., 614), the docketing of a judgment creates a lien on all the land of the debtor in the county where docketed, from the date of the docketing, and that a mortgage is a lien only from the registration, would seem to be a sufficient answer to this question. It cannot be that the act of a debtor and a third party can impair or destroy the rights of the judgment creditor as to the excess over the homestead.' In *Vanstory v. Thornton* (1893), 112 N. C., 196, 34 Am. St. Rep., 483, 17 S. E. 566, the Court overruled the earlier case of *Leak v. Gay* (1890), 107 N. C., 468, 12 S. E., 312, and held that a judgment creditor has a lien on any surplus over and above the homestead exemption, and no act of the debtor can impair the creditor's right under this lien. The Court said: 'In some states a docketed judgment creates no lien on the homestead land, but in this State such a judgment creates a lien on all the land of the debtor, both that outside of the homestead boundaries and that within those boundaries, the only difference being that the lien on that which is within the homestead boundaries is not enforceable by execution or other final process until there has come about, in some way, a termination of the debtor's constitutional exemption rights in this land, which rights, vested in him by the organic law, may be prolonged after his death, for the benefit of his widow in some instances, and in some for the benefit of infant children. As we have said, he cannot now enforce his lien on the homestead land, but his debtor cannot displace that lien by any act of his. It is fixed on the land by law, and this Court can only recognize and at the proper time enforce it.' "

In the *Vanstory case, supra,* at p. 210, it is said: "If there is to be any present division of this fund between the parties, it must be a matter of arbitration or agreement among themselves, for the courts have no rule by which to determine what exemption rights are worth in cash, their present value, the length of their duration depending on too many contingencies." These principles enumerated in the *Vanstory case,* are now applicable.

The General Assembly of 1905, chap. 111, passed the following: C. S., 729: "The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, Article X, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect."

This Court in *Sash Co. v. Parker,* 153 N. C., p. 130, held that this section is in accordance with the views of the Court and expresses the proper construction of Article X, section 2. It has been repeatedly held since, that the homestead exemption ceases upon its conveyance by the homesteader, in accordance with Const., Art. X, sec. 8, *supra. Caudle v. Morris,* 160 N. C., 168; *Crouch v. Crouch,* 160 N. C., 447; *Watters v. Hedgpeth,* 172 N. C., 310; *Duplin County v. Harrell, supra; Cheek v. Walden, supra.*

Defendant, Spencer Lumber Co., contends: "That the homestead right is a creature of the Constitution (Art. X, sec. 2, *supra*), and that neither the Constitution nor any statute makes any provision for paying to the homesteader the present cash value out of the funds, although there are several opinions of this Court containing *dicta* to that effect. It respectfully insists that they are erroneous, and are not supported by authority. If such should be permitted it is easy to conceive of a case in which the vested rights of judgment creditors in and to the fund at the end of the homestead period would be divested, contrary to the provisions of the Constitution. A young judgment debtor, having a long expectancy, if allowed to receive the present cash value of the fund, would receive substantially the whole thereof, thus divesting or impairing the judgment lien against the entire fund, except the small balance left. If plaintiff is entitled to the present value of his expectancy, same should be computed on the basis of 4½ per cent and not 6 per cent. Laws 1927, chap. 215—'This bill shall apply only to estates hereafter created.' Amending C. S., 1791."

We think the law is in accordance with defendant's contention that the homesteader is not entitled to the present cash value.

It should be observed that this case is presented upon a peculiar state of facts, and was tried upon a singular theory, but we are not at liberty to travel outside of the record or to determine the case on a theory different from that upon which it was tried.

We call attention to the record that suggests important questions vital that arise in everyday adjustments not presented to this Court on the present theory of the case: (1) Spencer Lumber Co., had a *first lien* on the house and lot under C. S., 614. (2) Thereafter plaintiff and his wife made a mortgage on this house and lot and it was sold under the terms of the mortgage and purchased by J. W. Gibson. The land was still subject to the lien of the judgment. It brought $1,296.75, more than enough to pay the judgment of $208.11.

Plaintiff, not having waived his homestead, was entitled to a homestead in the equity. *Duplin County v. Harrell, supra; Cheek v. Walden, supra.* On the theory of the case as now presented to this Court, in the judgment there is

No error.

R. B. LINEBERGER v. CITY OF GASTONIA, WINGET YARN MILLS COMPANY, RUBY COTTON MILLS, INC., AND DIXON MILLS, INC.

(Filed 2 January, 1929.)

1. **Parties Defendant—Joinder—Joint Tort-Feasors—Municipal Corporations—Sewerage—Pleadings—Demurrer—Nuisance.**

In an action against a municipal corporation and private corporations for causing a nuisance by reason of emptying sewage in a stream above the plaintiff's land, resulting in injury to plaintiff's land and affecting the health of the family at his residence: *Held,* the fact that each of the defendants acted independently of the others in emptying the sewage in the stream does not affect their joint liability when each knew or should have known that the sewage of each uniting with the other caused or would produce jointly the damages in suit, and a common concert of action, design, or purpose therein is not necessary to make them joint *tort-feasors* and their joinder as defendants is proper. *Semble,* there can be no contribution among joint *tort-feasors.*

2. **Pleadings—Demurrer—Speaking Demurrer—Pending Action.**

Where there is no allegation in the complaint of the pendency of a prior action, this defense may not be taken upon demurrer.

APPEAL by defendants, other than the city of Gastonia, from *Harding, J.,* at September Term, 1928, of GASTON. Affirmed.

Action to recover damages resulting from a nuisance, caused by continued trespasses of defendants.

It is alleged in the complaint that each of the defendants owns, maintains and operates a sewerage system, from which it discharges sewage into the water of Catawba Creek; that said waters, polluted by said sewage, flow over and across the land of plaintiff, thus causing the nuisance, which results in great damage to plaintiff. In this action, plaintiff demands judgment that he recover of defendants, as joint *tort-feasors,* a large sum as damages.

The city of Gastonia has filed an answer to the complaint, denying the allegations therein upon which plaintiff contends that the said city is liable to him for his damages; it contends, however, that if it is liable to plaintiff, its codefendants are also liable for said damages, as *tort-feasors,* and that each of the defendants should be required to pay its just proportion of any sum which plaintiff may recover in this action as damages resulting from the nuisance created by the joint acts of defendants.

Defendants, other than the city of Gastonia, demurred, severally, to the complaint, for that (1) there is a misjoinder of parties defendant and of causes of action, and (2) there are now pending in the Superior Court of Gaston County other actions wherein plaintiff seeks to recover of defendants herein, individually and severally, upon the cause of action alleged in the complaint in this action.

From judgment overruling their several demurrers, defendants, to wit: Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc., appealed to the Supreme Court.

J. L. Hamme for plaintiff.
A. E. Woltz and Mangum & Denny for city of Gastonia.
Cansler & Cansler, Mason & Mason and A. C. Jones for appellants.

CONNOR, J. This action was begun on 9 August, 1927. Summons issued on said day was duly served on each of the defendants herein.

The original complaint was filed on 10 August, 1927. Plaintiff alleges therein that he has suffered damages caused by the creation of a nuisance on his land by the trespasses and wrongful acts of defendants. Each of the defendants owns, maintains and operates a sewerage system from which it discharges sewage into Catawba Creek, above the land of plaintiff. The waters of said creek, polluted by said sewage, flow on and upon plaintiff's land, causing the nuisance which has resulted in damages to plaintiff.

Each of the defendants demurred severally to said complaint, upon the ground that there was a misjoinder therein of parties defendant and of causes of action, in that it appears from the allegations of the complaint that defendants are not and were not joint *tort-feasors* with respect to the trespasses and wrongful acts alleged therein, but that said trespasses and wrongful acts were and are separate and distinct, each of said defendants acting therein independently of the other defendants, without unity of purpose or concert of action.

Thereafter, on 2 September, 1927, by leave of court, plaintiff filed an amended complaint, in which in addition to the allegations of the original complaint, it is alleged that "defendants have jointly and severally affected the flow of said creek, contaminated its waters as aforesaid, above the land of plaintiff," and thus caused the nuisance which has resulted in the damages which plaintiff seeks to recover of defendants in this action. Defendants severally demurred to said amended complaint, substantially upon the same grounds as those upon which they demurred to the original complaint.

While the said demurrers were pending, and before the issue thereby raised had been determined, at March Term, 1928, by leave of court, plaintiff took a voluntary nonsuit in this action as against all the defendants except the city of Gastonia. Upon motion of plaintiff the action was dismissed as to the defendants, Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc. Judgment to that effect was signed on 24 February, 1928.

Thereafter, at June Special Term, 1928, defendant, city of Gastonia, withdrew its demurrer, and filed an answer to the complaint, denying all the allegations of said complaint upon which plaintiff contends that said city of Gastonia is liable to plaintiff for the damages, resulting from the nuisance alleged in the complaint. At said June Special Term, 1928, upon motion of the city of Gastonia, it was ordered that Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc., be and they were made parties defendant by summons duly issued and served upon them. In its motion upon which the said order was made, as the ground for the same, the city of Gastonia alleges that if there is any liability on the part of said city in this action, or if the plaintiff has sustained or is sustaining any damage as alleged in the complaint, the said Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc., are liable to plaintiff for said damages as joint *tort-feasors,* upon the allegations of the amended complaint.

After summons had been served on appellants, and after they had been made parties defendant in this action, upon motion of the city of Gastonia, to wit, on 27 August, 1928, plaintiff filed an amended complaint, which supersedes the original complaint filed on 10 August, 1927, and the amended complaint filed on 2 September, 1927. Demurrers have been filed to this last complaint by each of the defendants, other than the city of Gastonia.

After the judgment dismissing the action, upon motion of plaintiff, as against Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc., to wit, on 3 March, 1928, plaintiff began an action in the Superior Court of Gaston County, against each of said corporations, upon the same cause of action as that set out in the complaint in this action. A complaint and answer have been filed in each of said actions. These several actions are now pending.

In the amended complaint, filed on 27 August, 1928, plaintiff alleges that each of the defendants owns, maintains and operates a sewerage system. The city of Gastonia owns, maintains and operates its sewerage system, under the provisions of its charter, as a municipal corporation. The other defendants are industrial corporations; each owns, maintains and operates its own sewerage system, for its own use, and for the use of its employees, and of members of their families. The sewage from each of said systems is discharged into waters which flow through Catawba Creek upon the land of plaintiff.

The allegations of the complaint more particularly pertinent to the decision of the question presented by this appeal are as follows:

"4. That each of the defendants herein severally divert other waters from their usual courses, pollute same as hereinafter alleged, are now diverting, and for more than three years past have so diverted waters to the said Catawba Creek above the lands of this plaintiff, and have for such period severally discharged said waters, together with other offensive materials as hereinafter alleged into said Catawba Creek, directly or indirectly, above the lands of plaintiff, as aforesaid, by means of pipes, sewer lines, and ditches or drains, so divert and deposit into said waters such material together with untreated human excrement and other filthy and obnoxiously odorous materials, having been severally gathered by each and every of the defendants and transported as aforesaid, that by reason of the bringing together of the said filthy materials and depositing same as aforesaid, the defendants have jointly and severally, materially affected the flow of said creek, contaminated its waters, as aforesaid, above the lands of this plaintiff; which said waters are so contaminated as they flow over the lands of this plaintiff; that at frequent intervals, throughout the year, deposit filth as aforesaid, on and upon the lands of this plaintiff, and among the trees, bushes and shrubbery along said bottom lands, render same veritable breeding places for mosquitoes, flies and other obnoxious insects, and thereby so contaminating the atmosphere with such insects, flies, mosquitoes, obnoxious odors, as to render fully fifty acres of said lands useless for human habitation or tendance, and at times invade his home by means of said flies and mosquitoes, thereby depriving him of the quiet and peaceable possession and enjoyment of same, rendering same all but uninhabitable, greatly menacing the health of his entire family, whereby he has been caused to suffer great mental anguish and pecuniary losses, as hereinafter alleged."

"5. That by reason of the contamination of the water of said Catawba Creek, as aforesaid, and the consequent contamination of the air as aforesaid, proximately resulting from the joint and several acts of omission and commission on the part of each and every one of the defendants in this action, this plaintiff has been damaged in the sum of ten thousand dollars ($10,000), to the commencement of this action."

Appellants each demurred to said amended complaint for that (1) there is a misjoinder therein of parties defendant and of causes of action; and (2) there are now pending in the Superior Court of Gaston County other actions wherein plaintiff seeks to recover of defendants, individually and severally, upon the cause of action alleged in the complaint in this action. They have appealed from the judgment overruling their several demurrers. The only assignment of error presented on their appeal to this Court is based upon their exception to said judgment.

This assignment of error cannot be sustained, on either ground. With respect to the first ground, to wit, that there is a misjoinder of parties defendant and of causes of action, the judgment is sustained by the decision of this Court in *Moses v. Morganton,* 192 N. C., 102, 133 S. E., 421. It is conceded in the opinion in that case, that there are decisions of courts of other jurisdictions which are not in full accord with our decision. It is said: "In many cases of this kind it has been held to make parties joint *tort-feasors* there must be a common concert of action, design or purpose. In the instant case, this may be shown from the result, sequence and consequences of the independent acts. If parties, although acting independently know or have reasonable ground to believe that their independent acts, combining with the independent acts of others will create a result that will become a nuisance, and they do so, causing damage, they become as it were joint wrongdoers *ab initio,* and are liable as joint *tort-feasors.* Where all have knowledge of the independent acts that create the result, and continue the independent acts with knowledge, this *ipso facto* creates concert of action and makes a common design or purpose." We are unable to distinguish the instant case from *Moses v. Morganton,* and upon the authority of our decision in that case, hold that there was no error in overruling the demurrer upon the first ground.

With respect to the second ground for the demurrers, to wit, that there are now pending in the Superior Court of Gaston County other actions wherein plaintiff seeks to recover of defendants, individually and severally, upon the cause of action alleged in the complaint in this action, it is sufficient to say that this does not appear upon the face of the complaint. In *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545, it is said: "A demurrer would lie if the pendency of the former action appeared on the face of the complaint." It appears from the record in this action that the other actions referred to in the demurrers, as now pending, were begun after this action, and while same was pending. Appellants were defendants of record in this action from the date on which the action was begun, until the judgment upon the voluntary nonsuit, dismissing the action as to them. The other actions were not begun until this action was dismissed as to appellants. Appellants were again made parties defendant, upon motion of the city of Gastonia, in order that it might present to the court, for decision, its contention that if plaintiff shall recover in this action against all the defendants, or against any two or more of them, the defendant who shall pay the judgment will be entitled to contribution from the others or the other. This contention is not now presented for decision, and may well await the results of the trial.

See, however, C. S., 618, which seems to abrogate the well settled rule that, subject to some exceptions (*Gregg v. Wilmington,* 155 N. C., 18, 70 S. E., 1070), there can be no contribution between joint *tort-feasors. Raulf v. Light Co.,* 176 N. C., 691, 97 S. E., 236. We find no error. The judgment is

Affirmed.

ELLEN McCLURE v. J. S. FULBRIGHT ET AL.

(Filed 2 January, 1929.)

1. Costs—Persons Entitled.

The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the Superior Court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. C. S., 1274, 1275.

2. Pleading—Counterclaim—Actions on Contract—Judgments.

An unpaid judgment in favor of a party to an action rendered previously to the commencement of the present action is in legal effect a contract upon which a counterclaim may be pleaded in an action by the opposing party brought against him to recover on a promissory note. C. S., 521.

APPEAL by plaintiff from *Harwood, Special Judge,* at September Term, 1928, of HAYWOOD. No error.

Action upon note executed by defendants, and payable to plaintiff. Defendants admit the execution and nonpayment of the note; they plead as a counterclaim in this action a judgment rendered in another action in favor of defendants and against the plaintiff for the costs of said action.

The issues submitted to the jury were answered as follows:

"1. Are the defendants indebted to the plaintiff; if so, in what amount? Answer: Yes, $250.00, with interest from 24 December, 1925.

"2. Is the plaintiff indebted to the defendants; if so, in what amount? Answer: Yes, $322.00."

From judgment on the verdict that plaintiff recover nothing of the defendants, and that defendants go hence without day, and recover of plaintiff their costs in this action, plaintiff appealed to the Supreme Court.

Hannah & Hannah for plaintiff.

Morgan & Ward, M. G. Stamey, Moody & Moody and J. D. Mallonee for defendants.

Connor, J. There are no assignments of error upon plaintiff's appeal to this Court, with respect to the trial of the first issue. Defendants admitted the execution and nonpayment of the note sued on, by which defendants promised to pay to the order of the plaintiff the sum of two hundred and fifty dollars, with interest at six per cent from 24 December, 1925. The note became due prior to the commencement of this action. The answer to the first issue was in accordance with the instructions of the court, to which there was no exception.

There was evidence to the effect that on 24 December, 1925, plaintiff by deed duly conveyed to defendants certain land situate in Haywood County, North Carolina. The consideration for the note sued on in this action was the purchase money for said land. After the execution of said deed, plaintiff began an action in the Superior Court of Haywood County against the defendants for the purpose of having said deed declared void, and set aside. The action was tried at September Term, 1927, of said court, and resulted in a verdict and judgment in favor of defendants and against the plaintiff. In said action it was ordered and adjudged that defendants recover of plaintiff their costs to be taxed by the clerk. The costs as taxed by the clerk, including the witness fees, amounts to $362.30. A judgment for said sum, in favor of defendants and against the plaintiff has been duly docketed in the office of the clerk of said court. This judgment has not been paid by plaintiff, or by the surety on her prosecution bond filed in said action; no execution has been issued on said judgment against plaintiff, or against her surety. The judgment was in full force and effect on the date of the commencement of this action. Defendants allege that the amounts due to the witnesses as taxed by the clerk, and included in said judgment have been paid by and assigned to them, and that they are now the owners of said judgment. They plead said judgment as a counterclaim in this action.

Plaintiff, on her appeal to this Court, contends that there was no evidence at the trial tending to show that defendants are now or were on the date of the commencement of this action the owners of said judgment, for that they failed to offer evidence from which the jury could find that defendants had paid any of the fees taxed by the clerk, and included in the judgment, or that the amounts due for said fees had been assigned to defendants.

This action was begun on 10 November, 1927. The judgment docket offered in evidence by defendants, upon which said judgment is recorded, shows entries on said docket opposite the names of the witnesses, as follows: "Assigned to J. S. Fulbright, 1 October, 1927." There is also attached to the judgment an assignment in writing of the fees due witnesses, which purports to have been signed by each of the witnesses. This assignment bears the following endorsement, in the handwriting of the clerk, "Received and filed 12 October, 1927." There is no evidence showing or tending to show that the witnesses whose names appear upon the docket or upon the assignment, signed the same, or authorized any one else to do so. There is no evidence showing or tending to show that the names of the witnesses appearing on the assignment are in their handwriting. We must, therefore, hold that there was no evidence from which the jury could find that the amounts taxed by the clerk as fees for the witnesses, and included in the judgment, have been assigned to defendants. The entries on the record were not evidence showing such assignment. *Tyson v. Joyner,* 139 N. C., 69, 51 S. E., 803. It does not follow, however, that defendants are not now, and were not on the date of the commencement of this action the owners of the judgment, rendered in their favor and against the plaintiff. An assignment of said judgment, or of the items included therein, was not required to constitute defendants such owners.

It is provided by statute that "every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the State and municipal corporations excepted) to pay the same previous to the departure of the witness from court, such witness may at any time sue and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface the ticket by writing the word judgment, and deliver the same to the person of whom it is recovered." C. S., 1274.

It is further provided by statute that "at the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact." C. S., 1275. Notwithstanding the last provision in the foregoing statute, all the witnesses who have attended the trial, and who have proved their attendance, are entitled to recover their fees and mileage of the party at whose instance they were summoned. Such party, however, is entitled to recover of the party cast only the amount paid by him or due to two witnesses who were summoned and who testified as to a single fact. *Cureton v. Garrison,* 111 N. C., 271, 16 S. E., 338. A judgment for costs, including fees due to the officers and to witnesses, is for the benefit of the party in whose favor the judgment was rendered, and not for the benefit of the officers and witnesses. The officers may demand their fees in advance of rendering the service required of them, and the witnesses are entitled to recover their fees of the party at whose instance they were summoned. The statute contemplates that the fees due witnesses shall be paid by the party liable for them, and that the witness tickets shall be filed with the clerk by such party, and not by the witnesses. When the costs have been taxed by the clerk, and included in the judgment, the party in whose favor the judgment was rendered is the owner thereof. No assignment of the fees by the officers or witnesses to whom they were originally due is required to constitute such party the owner of the judgment.

Plaintiff contends that, conceding that defendants are now and were at the date of the commencement of this action, the owners of the judgment for costs, rendered in the former action between them, defendants cannot avail themselves of said judgment as a counterclaim in this action. This contention cannot be sustained.

This is an action on a contract to which plaintiff and defendants were parties. Any cause of action arising on a contract, and existing at the commencement of this action, in favor of defendants and against plaintiff, may be pleaded by defendants, in their answer, as a counterclaim. C. S., 521. It has been said that "this statute is very broad in its scope and terms, is designed to enable parties litigant to settle well nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose." *Hoke, J.,* in *Smith v. French,* 141 N. C., 1, 53 S. E., 435. "The test of a counterclaim as provided by statute is: could the defendant maintain an action against the plaintiff?" *Pearson, C. J.,* in *Battle v. Thompson,* 65 N. C., 407.

It is well settled that, by construction of law, a judgment is a contract for most purposes. Defendants had a cause of action against plaintiff, existing at the commencement of this action. This cause of action was upon contract. The judgment was therefore properly pleaded as a counterclaim, and there was no error in the trial below with respect to the second issue. It has been generally held that a judgment may be pleaded as a counterclaim. 24 R. C. L., p. 824, sec. 31. The judgment is affirmed. There is

No error.

STATE v. R. W. MAYER.

(Filed 2 January, 1929.)

False Pretense—Criminal Responsibility—Elements of Crime.

The seller of merchandise may not be convicted of procuring the sale by false pretense when the buyer acted independently in having the articles examined and agreed upon a lower price than the one first offered by the seller and knowingly concluded the contract upon that basis, one of the essential elements of the crime being lacking to create the offense, that the false representations must actually deceive and defraud the buyer.

CRIMINAL ACTION, tried before *Moore, J.*, at February Term, 1928, of MADISON.

The defendant was charged with the crime of false pretense, arising out of the sale of certain logging equipment, rails, etc., to the Southern Iron & Equipment Company.

Two elements of false pretense charged in the bill of indictment were:

1. False representation made by the defendant to the purchaser to the effect that he had paid $32,000 for the equipment.

2. False representation to the effect that the quantity of rails included in the sale amounted to 23 track miles of rail.

The evidence tended to show that in the early part of October, 1925, the defendant approached the Southern Iron & Equipment Company of Atlanta, Georgia, for the purpose of selling to said company certain logging equipment consisting of machinery and rails of a logging road. The defendant represented that he was the owner of all of said property, and that he had paid therefor the sum of $32,000. The defendant further represented that the rail which he was offering to sell amounted to 23 track miles. The proof offered at the trial disclosed that the defendant instead of paying $32,000 for said property, had paid therefor only $21,500. It was also disclosed that the rail, instead of amounting to 23 track miles, measured out only 15.5 track miles.

On 12 October, 1925, the plaintiff wrote the Southern Iron & Equipment Company at Atlanta, stating: "Your Mr. Corbett and I estimate there to be three miles of 70-pound rail and 20 miles of 56-pound rail, railroad weight to be accepted, connecter, switches, etc., to be weighed in."

On 19 October, 1925, the defendant wrote the Southern Iron & Equipment Company a letter containing, among other statements not pertinent, the following: "The rails and accessories estimated as approximately two thousand tons. You accepting same, where is and as is, at price $15.00 per gross ton of 2,240 pounds. If the estimated tonnage of two thousand tons, which is the basis of this agreement, should be more, according to the railroad weights, as shipment is made, then you are to pay me an additional amount, at the rate of $15.00 per ton of 2,240 pounds, and if the tonnage should be less than two thousand tons, then I am to pay the difference to you at the same rate."

On 9 November, 1925, the defendant executed and delivered to the Southern Iron & Equipment Company a bill of sale for "all rails, switches, frogs, spikes and accessories," etc. This bill of sale did not mention tonnage or track miles. On the same day, to wit, 9 November, the defendant made a supplemental agreement with the purchaser, conveying to the purchaser certain flat cars and miscellaneous scrap, "to apply to any shortage in weight of the personal property this day also conveyed by said party of the first part to the party of the second part of the approximate tonnage of 1,750 tons of rail and track accessories," etc.

The evidence further disclosed that the Southern Iron & Equipment Company, sent its representative and inspector to examine the property included in the sale. The rails were piled in 14 separate piles just as they had been unloaded from the cars by the Laurel River Logging Company. The inspector of the purchaser made three trips to examine the rails and to count them. He testified: "I had all the opportunity I wanted to count these rails at that time. I was there with Buck Landers. Buck Landers told me there were only 15 miles of rail. I employed him to help me count the rails. He did not tell me he was familiar with that railroad. He told me that it was his opinion that there were 15 miles of rails. We spent probably an hour and a half or two hours at that time marking the rails. Mr. Landers and I chalk marked as many rails as we could. I counted them. I do not know how many I counted at that time. . . . As a result of my visits and my making investigations, I changed that contract from approximately 2,000 to approximately 1,750 tons, and made a new contract on 19 November, three weeks afterwards. I had three weeks from the first time I came to make any investigation I wanted to, and I made three trips up here. . . . In that written contract there was not a word said about mileage, but verbally there was. While we had two written contracts, I did not put anything in either about mileage, because it was based on a tonnage basis."

With respect to the alleged representation, that the defendant had paid $32,000 for said property, the agent and representative of the Southern Iron & Equipment Company testified as follows: "It was the agreement that we would not complete the trade until we saw that contract. (Contract between Laurel River Logging Company and Mayer.) I saw on the face of that contract that Mr. Mayer was paying only $21,500 at that time. I remarked to him that he was making a very nice profit, a couple of hours later, after the deal was closed. In the face of the fact that I knew he had not paid but $21,500, before the contract was closed, I swore before the grand jury that we were deceived in that he had told me that he had paid $32,000, because he had told me that he had paid $32,000, because I had not seen the papers until they were out of my hands. They were in the hands of our lawyer."

The defendant was convicted and sentenced to serve a term of not less than five nor more than eight years in the penitentiary, from which judgment he appealed, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. R. Williams and Varser, Lawrence, Proctor & McIntyre for defendant.

BROGDEN, J. "The constituent elements of the offense of false pretense are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made." *S. v. Johnson,* 195 N. C., 506; *S. v. Roberts,* 189 N. C., 93, 126 S. E., 161; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30.

The record in this case contains many assignments of error. The defendant duly made a motion of nonsuit, contending that the evidence, viewed in its most favorable light, clearly disclosed that the Southern Iron & Equipment Company, in purchasing said rails from the defendant, was not deceived or misled by the representations made by him for the plain reason that all of the evidence tended to show that the purchaser of said property, through competent and expert agents, made a thorough and independent investigation of the quantity and quality of the property included in the sale. The principle of law involved in this aspect of the case is clearly stated as follows in *Patton v. Fibre Co.,* 194 N. C., 765, 140 S. E., 734: "It is well settled that one cannot secure redress for fraud where he acted in reliance upon his own knowledge or judgment based upon independent investigation. This rule is said to be especially applicable where the representee's investigation was undertaken at the suggestion of the representor."

The evidence further discloses that the contracting parties abandoned the mileage basis and adopted a tonnage basis upon which to consummate the transaction. Indeed, after the tonnage basis was adopted, the agent of the purchaser, as a result of his investigation, reduced the estimate of 2,000 tons made by the defendant to 1,750 tons.

The evidence is plain and unmistakable. The purchaser knew before the contract was closed that the defendant was not paying $32,000 for said property, and the purchaser further knew, or had sound reason to believe, that the estimate made by the defendant was too high, and for this reason insisted that the amount of rail be reduced.

It is useless to set out an array of authorities or to pyramid quotations therefrom. The purchaser made the contract with his eyes wide open, and after a complete and thorough independent investigation, and cannot now invoke the aid of the criminal law to repair an error of judgment in making a bad bargain.

The motion for nonsuit should have been allowed, and it is so ordered.

Reversed.

STATE v. ALLEN DILLS AND IDA DILLS.

(Filed 2 January, 1929.)

1. **Homicide—Evidence—Weight and Sufficiency.**

Where the evidence tends to show that the deceased, unarmed, came to the place where the defendants and others were fighting together, and in trying to pacify them he was turned upon by the defendants, and that the husband shot the deceased and killed him, while his wife joined in the assault with a stick, with further evidence of a previous encounter between the parties, and of motive: *Held*, the evidence that the assault on the deceased was a result of concerted agreement between the defendants, and that there was a preconceived purpose and joint assault was sufficient to take the case to the jury, and it was not error for the trial court to refuse to dismiss the action against the feme defendant.

2. **Homicide—Excusable or Justifiable Homicide—Defense of Others—Questions for Jury.**

Where the husband and his wife are tried for murder in the second degree, and there is evidence that he fired the fatal shot in self-defense while his wife assisted him, an instruction that she must satisfy the jury that she fought in her own defense is reversible error when there is evidence, and the feme defendant contends that she was engaged in defending her husband.

3. **Homicide—Excusable or Justifiable Homicide—Self-Defense—Duty to Retreat.**

Where the defendant on trial for homicide is without fault in bringing on the affray, and is assaulted with a pistol and is put in fear, and has reasonable grounds to fear, that his life will be taken or that great bodily harm would be inflicted and it reasonably appears to him to be necessary to kill the deceased to save his own life or to protect himself from great bodily harm, he is not required as a matter of law either to retreat or to withdraw from the combat, and his killing the deceased under these circumstances is excusable on the principle of self-defense.

APPEAL by defendants from *Moore, J.*, at August Term, 1928, of MACON.

The defendants were convicted of murder in the second degree and from the judgment pronounced they appealed. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moody & Moody and R. D. Sisk for defendants.

ADAMS, J. The defendants, husband and wife, were indicted for the murder of Dave Waldroop but were not prosecuted for murder in the first degree. Their testimony in almost every essential element is diametrically opposed to that of the prosecution. The homicide occurred on 24 March, 1928. The defendants, their child, and Bill Shope, a brother of the female defendant, occupied a house situated on the side of a mountain, and in front of the house was a rugged road across which ran a branch a short distance lower down. About 125 feet up the mountain, on the same side of the road, was a house in which Mack Waldroop (a son of the deceased) and his wife lived, and about 300 feet farther up the road was another house occupied by the deceased and his other sons, Luther and Rufus. The record indicates that the men other than Shope were tenants of Ed Cruse, the Waldroops having recently moved to the land.

The State offered evidence tending to show that on the day of the homicide at 8 o'clock in the morning, Mack Waldroop heard Ida Dills "talking vicious" to his wife, "fulminating accompaniments agitating her rhetoric"; that she retired after aiming a loaded gun first at his wife then at him; that Allen Dills came to a side gate about thirty minutes afterwards flourishing an automatic pistol and menacing fatal injury, not only to Mack Waldroop and his wife, but to the deceased and his other sons who had recently appeared; that Allen went away apparently content with a threat to take Mack's life before 12 o'clock; that about this hour Mack drove his mules to the branch to water them; that as he passed Allen's house he was assaulted by the defendants and Bill Shope—by Allen with his "automatic" and by Ida with a club, Shope meantime holding Mack's shoulder and afterwards using a stick; that the deceased came up unarmed and tried to quiet the assailants, whereupon Allen Dills shot the deceased through the heart and caused his instant death; that Allen then pointed his pistol at Mack and that Luther fired a shotgun at Allen and wounded him.

On the part of the defendants there was evidence tending to show that in the melee between Allen's wife and Mack's wife each had a gun; that the encounter between Allen and Mack at eight-thirty was a harmless "cuss-fight"; that Allen was going across the road for stovewood when he met Mack at 12 o'clock; that no assault was made on Mack; that the deceased was the aggressor, assaulting Allen with a pistol, and that Allen shot the deceased in self-defense.

It would clearly have been error to dismiss the action as to Ida Dills. There is ample evidence for a reasonable inference that the assault on Mack, immediately before the fatal shot, was the result of a concerted agreement between Shope and the defendants, and that the shot fired by Allen Dills was in legal effect the deed of all. *S. v. Bowman,* 152 N. C., 817; *S. v. Merrick,* 171 N. C., 788. It was testified that they turned Mack loose and made a joint assault upon the deceased the moment they saw him. There being evidence of a preconceived purpose and a joint assault it would have been an inadvertence to hold that Ida Dills was excusable merely because she did not actually compass the homicide. *S. v. Finley,* 118 N. C., 1162.

There was error, however, in the instructions given the jury. His Honor charged the following as the essential elements of self-defense: (1) The defendant must be free from fault, that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he be disregardful in this respect of any wrongful word or act; (2) there must be a present impending peril to life or great bodily harm, either real or so apparent as to create the honest belief in the mind of the defendant that there is an existing necessity to take the life of the person intended to be killed at the time he attempts to take it or takes it; (3) there must be no convenient or reasonable mode of escape from the danger by retreat or by declining the combat.

It will be noted that the second and third clauses in substance embody the instruction that if the deceased was in the act of making such an assault upon the defendant, Allen Dills, as created in his mind a reasonable apprehension of impending peril to his life or of great bodily harm it was incumbent upon the defendant to show that there was no reasonable mode of escape from the danger by retreat or by declining the combat.

In *S. v. Clark,* 134 N. C., 698, after defining "felonious assault" as an assault made with murderous intent or with intent unlawfully to kill, the Court said: "Whether a felonious assault was being made or not, if the defendant, from the circumstances and surroundings as they then appeared to him, reasonably apprehended that the deceased was assailing him with the intent to kill him or to do him great bodily harm, he had the right, if he was not himself already in fault, to stand his ground and defend himself, and, if necessary, to take the life of his assailant; and this would be true, though it afterwards appeared that the deceased did not in fact intend to commit a felonious assault. *S. v. Matthews,* 78 N. C., 523; *S. v. Barrett, supra,* and cases cited." *S. v. Blevins,* 138 N. C., 669; *S. v. Blackwell,* 162 N. C., 672, 683; *S. v. Johnson,* 166 N. C., 392; *S. v. Pollard,* 168 N. C., 116; *S. v. Bost,* 192 N. C., 1. If Dills was without fault and the deceased assaulted him with a pistol and by reason of such assault Dills actually apprehended and had reasonable grounds to apprehend that his life was in danger or that he was in danger of great bodily harm and that it was necessary or reasonably appeared to him to be necessary to kill the deceased to save his own life or to protect himself from great bodily harm he was not required as a matter of law either to retreat or to withdraw from the combat, and if under these circumstances, in the exercise of ordinary firmness, he shot and killed the deceased, the homicide would be excusable upon the principle of self-preservation. But to have the benefit of this doctrine he must show that he was free from blame and that he took life only when it was necessary or apparently necessary to save his own life or to protect himself from great bodily harm. As stated in *S. v. Blevins, supra,* it is otherwise in ordinary assaults, even with deadly weapons. In such cases a man is required to withdraw, if he can do so, and to retreat as far as may be consistent with his own safety, though as said in *S. v. Dixon,* 75 N. C., 275, 279, he may repel force by force and give blow for blow. *S. v. Kennedy,* 91 N. C., 572. In his charge the trial judge inadvertently confused these principles.

In reference to Ida Dills' participation the judge gave this instruction: "If she was aiding and abetting her husband who did use a deadly weapon, then if you find she was aiding and abetting her husband who admits he used a deadly weapon, then the burden would still be on her to satisfy you that she fought and did what she did in her own self-defense."

Allen Dills contended that he shot the deceased in self-defense and his wife contended that she was engaged in defending her husband. Whether she aided him in an unlawful assault or only in his lawful defense is a matter which should have been explained and submitted to the jury. *S. v. Cox,* 153 N. C., 638; *S. v. Greer,* 162 N. C., 640, 649; *S. v. Gaddy,* 166 N. C., 341.

For error in instructions there must be a
New trial.

WILLIAM E. FISHER, BY HIS NEXT FRIEND, W. C. WAKEFIELD, v. E. L. DEATON AND MRS. HATTIE DEATON.

(Filed 2 January, 1929.)

Highways—Regulation and Use for Travel—Law of the Road—Negligence —Automobiles—Instructions.

Where the plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car for which injury he seeks to recover damages in his action: *Held,* it is not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a cross-road, if he charges correctly upon the general law arising from the evidence. C. S., 564. *Bowen v. Schnibben,* 184 N. C., 248, cited and distinguished.

CIVIL ACTION, before *Cranmer, J.,* at April Term, 1928, of WAKE.

The plaintiff, a minor about four years of age, instituted this action against the defendant for personal injury resulting from being struck by defendant's automobile at or near the intersection of St. Mary's Street and the Calvin Road in the city of Raleigh.

The cause was submitted to a jury, and the issue of negligence was answered against the plaintiff and in favor of the defendant.

From judgment upon the verdict plaintiff appealed.

Gatling, Morris & Parker for plaintiff.
Charles U. Harris for defendant.

PER CURIAM. Calvin Road intersects St. Mary's Street from the west and terminates at the intersection. Defendant's car was being driven northwardly by his wife. The plaintiff, according to the evidence, was on the east side of St. Mary's Street opposite the intersection of Calvin Road and was running across the street toward the intersection. Had plaintiff been using the intersection of Calvin Road at the time of the injury, the failure of the car to slow down to 15 miles an hour might have been found to have been the proximate cause of the injury. However, as the plaintiff was not walking along the highway, but ran out from behind a car toward the intersection of Calvin Road, a different situation was presented, and for this reason the principle announced in *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170, does not apply.

The trial judge charged: "The driving of any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights of others, or without due caution and circumspection, and at a speed or in a manner so as to endanger or be likely to endanger any person or property, is 'reckless driving.' "

The judge further charged: "It is the duty of the driver of any vehicle to drive it at a careful and prudent rate of speed, not greater than is reasonable and proper, having due regard to the surface and width of the highway, the traffic and other existing conditions; and so as not to endanger the life, limb, or property of any person."

While the judge did not specifically call the attention of the jury to the provision of the statute requiring a motorist to reduce the speed to 15 miles an hour when approaching an intersection, there was no specific request for such instruction, and in our opinion the charge upon the question of negligence and the statutes applicable, constituted a substantial compliance with C. S., 564, in view of the facts disclosed in the present record.

Upon the face of the record we find no error of law warranting a new trial.

No error.

H. B. EDWARDS v. SOUTHERN STATES FINANCE COMPANY ET AL.

(Filed 9 January, 1929.)

1. **Corporations—Stock—Actions for Fraud in Procuring Subscriptions to Stock—Conspiracy.**

   The fraudulent misrepresentations of an agent of a corporation in the sale of stock therein are not competent evidence against the officers and directors, sued individually, when the representations were not made in their presence nor afterwards ratified by them, in the absence of an issue of conspiracy to thus defraud the plaintiff. *Insurance Co. v. Knight*, 160 N. C., 592, cited and distinguished.

2. **Same—Issue of Conspiracy.**

   In an action against the officers and directors of a corporation to recover damages for having been induced to subscribe to shares of stock in the corporation by fraudulent representations of others acting as sales agents of the corporation, which were not made in the presence of the defendants nor afterwards ratified by them, and there is evidence of a conspiracy to thus defraud, it is reversible error for the trial judge to refuse to submit the issue as to the conspiracy to the jury for their determination.

3. **Damages — Punitive Damages — Evidence of Financial Worth of Defendant.**

   Where punitive damages are not recoverable upon the pleadings, evidence as to the financial worth of the defendant is incompetent.

CIVIL ACTION, before *Harwood, Special Judge,* at February Term, 1928, of UNION.

The plaintiff instituted an action against the Southern States Finance Company, J. E. Ashcraft, J. R. Cherry, R. C. Newsome, A. P. Rhyne,

J. C. Walker, J. B. Elliott and W. W. Morris, who were officers and directors of said corporation.

Plaintiff alleged that the defendant, J. E. Ashcraft, was president and director of the Southern States Finance Corporation; that the defendant, Cherry, was secretary thereof, and the other defendants directors thereof.

Plaintiff further alleged that the defendant, Ashcraft, entered into a conspiracy with certain stock salesmen of the corporation to defraud the plaintiff, and in pursuance thereof, represented to him that said corporation was stronger than any bank; that "it was backed by a $15,000,000 company"; that the common stock had earned as much as 16%, and that if he purchased stock in said company and needed his money, it would be refunded to him upon a notice of sixty days.

Plaintiff testified that he relied upon these representations, and as a result thereof, bought $4,200 worth of stock. Dividends were paid for a certain period and were then discontinued. Plaintiff made demand for the return of his money, which was declined. Thereafter, the company became bankrupt and the plaintiff's investment was lost. Thereupon, he instituted the present suit against the officers and directors named, to recover from them damages, to the amount of money which he had invested in stock of the company.

The plaintiff also offered evidence tending to show that the defendant, Ashcraft, and other defendants had personally made false representations with respect to the condition of said company.

In apt time the plaintiff tendered issues arising upon the pleadings, including an issue of conspiracy in the following language:

"Did the defendant, Ashcraft, and the salesmen, Quimby, Hinman, Meyer and Helvenston, enter into a conspiracy to defraud plaintiff as alleged in the complaint?"

The trial judge declined to submit an issue of conspiracy, but submitted the following issues:

"1. Was the plaintiff, H. B. Edwards, induced to subscribe for and purchase stock in the Southern States Finance Company by means of misrepresentations and fraud practiced by the defendants or any of them, as alleged in the complaint?

2. If so, did the Southern States Finance Company participate therein, as alleged in the complaint?

3. If so, did the defendant, J. E. Ashcraft, participate therein as alleged in the complaint?

4. If so, did the defendant, J. R. Cherry, participate therein as alleged in the complaint?

5. If so, did the defendant, A. P. Rhyne, participate therein as alleged in the complaint?

6. If so, did the defendant, R. C. Newsome, participate therein as alleged in the complaint?

7. What amount, if any, is plaintiff entitled to recover?"

All of the issues so submitted were answered in the affirmative, the seventh issue having been answered as follows: "$4,200, less dividend. No interest. $132 dividend."

Judgment was entered upon the verdict.

The defendants appeal, assigning errors.

Vann & Milliken and H. B. Adams for plaintiff.
W. B. Love for R. C. Newsome.
J. C. Sikes for J. E. Ashcraft.
Armfield, Sherrin & Barnhardt for Ashcraft, Cherry and Rhyne.

BROGDEN, J. (1) In a suit for damages against the directors of a bankrupt corporation, upon the ground of fraudulent and false representations in the sale of stock, is evidence of false representations made by stock salesmen of the corporation, not in the presence of the directors sued, competent against such directors?

(2) In such an action, in the absence of allegation or proof warranting punitive damages, is it competent to offer in evidence the financial worth of one of the defendants?

The plaintiff seeks to recover from the defendants upon two theories, to wit:

First, that the defendants and stock salesmen of the corporation entered into a conspiracy to defraud the plaintiff and others, and that therefore the act or declaration of one conspirator is effective against all.

Second, that the defendants personally made false representations with respect to the financial condition of said corporation, and furthermore, concealed and suppressed with fraudulent intent the true condition of said company.

"In the case of the charge of a combination to defraud," remarks a recent writer, "the declarations of each of the parties to such combination, relating thereto, are evidence against the others, though made in the absence of the latter, provided the parties were at the time of the declarations in the furtherance of the common design. . . . Slight evidence of collusion or concert is sufficient to let in the declarations of one of the parties as evidence against all, but there must be some evidence of the combination." *Hauser v. Tate*, 85 N. C., 82.

The record discloses that evidence was offered by the plaintiff to the effect that the salesmen, Hinman and Helvenston, represented to him that the common stock was selling at $2.50 a share, and was earning a dividend as high as 16% net. Ashcraft was not present at this conversation. Later on a salesman named Quimby came to solicit plaintiff, and the plaintiff was permitted to testify that this salesman told him that "Dr. Ashcraft had sent him and they were making money hand over hand—couldn't take care of the business, and that if there was any possible chance for me to raise any money, he would be glad; he needed it, and all I could send him, . . . and that Dr. Ashcraft said that the common stock was then selling for $10 a share, and I subscribed for $500 worth—gave notes for $200 and $300."

The court told the jury: "The answer of the witness, gentlemen, will not be received by you at present as tending to prove that Quimby was sent by Dr. Ashcraft unless the plaintiff introduces testimony showing that Dr. Ashcraft had something to do with it, and will not consider Quimby's statement that he was sent by Dr. Ashcraft."

There was other evidence of like tenor. Such evidence was competent against the defendant, Ashcraft, and other directors, provided a conspiracy was shown. Ordinarily, a director of a corporation is liable for false and fraudulent representations made by him or his agent, within the scope of his employment, or for such as were approved or ratified. The rule governing such liability is thus expressed in *Anthony v. Jeffress,* 172 N. C., 378, 90 S. E., 414: "It is immaterial whether the defendants (directors) were cognizant of the insolvent condition of the company or not. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit."

It must be borne in mind that the stock salesmen, who made the fraudulent representations complained of, were not the agents or employees of Ashcraft and his codefendant directors, but were the agents and employees of the corporation which was a third party. These fraudulent representations made in the absence of Ashcraft and the other directors, by stock-selling agents of the corporation could, therefore, be competent against the individual defendants only upon the theory of a conspiracy. The issue of conspiracy was essential to the competency of such evidence. The trial judge failed and omitted to submit the issue of conspiracy tendered by the defendants, and the exception of the defendants to such ruling is sustained.

The plaintiff relies upon the cases of *Ins. Co. v. Knight,* 160 N. C., 592, 76 S. E., 623, and *Bank v. Sherron,* 186 N. C., 297, 119 S. E., 497. In the *Knight case,* the agents of the plaintiff made fraudulent representations to the defendant. The action was between the principal and the defendant. Certainly, when the principal sued the defendant upon a transaction procured by his own agents, the representations made by the agents in procuring the contract would be competent. The same reasoning applies to the *Sherron case,* because the plaintiff in that case claimed to be an innocent purchaser and holder of a note made by the defendant, the defendant asserting that plaintiff's title to said instrument was derived from a third party, and that the agents of such third party had made false representations in procuring the instrument, and the evidence was offered for the purpose of affecting plaintiff with notice under the negotiable instrument statute.

The witness, Fannin, testified that the defendant, Ashcraft, had made certain representations to him in an effort to procure the wife of witness to buy stock, and that the defendant, Ashcraft, among other things, had stated that he would return the money upon notice of thirty or sixty days after such return was desired. Thereupon, witness was asked the following question: "In that conversation with him, did Dr. Ashcraft make a statement? If so, what did he say about his own financial worth and responsibility?" The witness replied: "He said he was worth a hundred to a hundred and fifty thousand dollars; if he got my money and my wife's money he would see we didn't lose." There was no allegation in the complaint seeking punitive damages, and no such issue was submitted to the jury.

The defendant objected to the testimony elicited, and the exception to such evidence is sustained.

Evidence of the financial condition of a defendant is inadmissible except in cases warranting the award of punitive damages. *Tucker v. Winders,* 130 N. C., 147, 41 S. E., 8; *Arthur v. Henry,* 157 N. C., 393, 73 S. E., 206; *Carmichael v. Tel. Co.,* 162 N. C., 333, 78 S. E., 507.

The record covers four hundred and two pages, and there are two hundred and ninety-two exceptions. There are other exceptions not discussed worthy of grave consideration; but, as a new trial must be awarded, we deem it inadvisable to enter into a discussion of them for the reason that they may not arise again, and the further reason that it is practically impossible, in a lengthy discussion of alleged errors, to guard against possible intimations that might be confusing to the trial judge upon another hearing.

New trial.

J. R. JENKINS, ADMINISTRATOR OF LEVI JENKINS, DECEASED, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 9 January, 1929.)

1. **Railroads—Right of Way—Trespassers and Licensees.**

Where the railroad company knowingly and constantly permit the public to use a portion of its track as a walkway, a person walking thereon is a licensee and not a trespasser.

2. **Railroads—Negligence—Injuries to Person On or Near Track—Licensees.**

A railroad company is liable in damages for the injury of a licensee sitting on the end of a sill upon the track when by the exercise of due care by its employees in operating the train they saw or should have seen that he was in a helpless condition in time to stop the train and avoid the injury.

3. **Same—Last Clear Chance—Issues.**

Upon evidence tending to show that the plaintiff's intestate was sitting in a helpless condition upon the track of the defendant railroad company, and that by the exercise of due care the defendant's employees should have seen his condition in time to have avoided the injury by stopping the train, and there is also evidence of the contributory negligence of the intestate: *Held,* in addition to the issues of negligence, contributory negligence, and damages, an issue as to the "last clear chance" should have been submitted to the jury upon the conflicting evidence.

4. **Same—Liability of Employees.**

A railroad company is required to keep a proper lookout ahead of its moving train for those upon the track at a place where they permit the track to be used by the public as a walkway, and it is not excused from this duty by the fact that at the time of running upon and killing a pedestrian obviously helpless upon the track, that those in charge of the operation of the train had other duties to perform in connection therewith preventing their keeping a lookout, this being available to the employees alone when they are joined as codefendants in the action.

APPEAL by plaintiff from *MacRae, Special Judge,* at October Special Term, 1928, of HAYWOOD. Reversed.

Action to recover damages for the wrongful death of plaintiff's intestate, who was struck and killed by a moving freight train of the defendant, Southern Railway Company, operated at the time by the other defendants, as engineers and firemen, who were charged with the duty of keeping a lookout for persons on the track in front of the moving train. The train was composed of two heavy locomotive engines, and ten or twelve cars. It was running as a "double-header."

Plaintiff's intestate, at the time he was struck and killed by train, was sitting on the end of a cross-tie, apparently unconscious of the approach of the train. He was not at or near a crossing, public or private, nor was he an employee of defendant railway company. He had been walking on the track shortly before he sat down on the cross-tie, on his way from Lake Junaluska to his home. There was evidence tending to show that the track at this point was constantly used by the public, to the knowledge of defendants, as a walkway. Deceased was walking on the track as a licensee, and not as a trespasser. There was evidence tending to show that he was returning to his home because he was ill, and that he was ill when he sat down upon the cross-tie. He remained there for some time, unconscious of his peril, because of his illness. He failed to respond to a warning given him by a witness of the approach of the train, when the train was forty or fifty feet from him. There was no blowing of the whistle or ringing of the bell on the engine, as the train approached him. The noise made by the moving train could have been heard by him, but no signal was given indicating that the engineers or firemen had seen the deceased before the train struck him.

It is alleged in the complaint that defendants and each of them failed to exercise due care to keep a proper lookout from the train for persons who were or who might reasonably be expected to be on the track in front of the moving train, at the point where deceased was sitting on the cross-tie, and that such failure was the proximate cause of the injuries which resulted in the death of plaintiff's intestate.

From judgment dismissing the action, as upon nonsuit, at the close of the evidence, upon motion of defendants, plaintiff appealed to the Supreme Court.

W. R. Francis and Alley & Alley for plaintiff.
Thomas S. Rollins for defendants.

CONNOR, J. There was error in allowing defendants' motions for judgment as of nonsuit, at the close of the evidence, and in the judgment dismissing the action.

There was evidence tending to show that defendants and each of them failed to exercise due care to keep a vigilant and proper lookout from the moving train for persons who were or who might reasonably be expected to be on the track in front of the train, where plaintiff was sitting on the end of the cross-tie, and that such failure was the proximate cause of the injuries which resulted in the death of plaintiff's intestate.

The evidence was sufficient to sustain a finding by the jury that if a proper lookout had been kept by defendants, plaintiff's intestate would have been discovered on the track in time for the train to have been stopped before it reached and struck him. There was evidence to the contrary. The conflicting evidence with respect to this matter should have been submitted to the jury, under appropriate instructions, upon the issues involving (1) actionable negligence on the part of defendants; (2) contributory negligence on the part of the deceased; (3) the principle of the "last clear chance," and (4) damages.

If the jury had found from the evidence that neither of the employees of defendant railway company, who are defendants in this action, could have seen deceased, by the exercise of due care, in time to have had the train stopped before it struck him, because he had other duties to perform besides keeping a lookout, or because of the position in which he was required to be for the performance of such duties, while this finding would relieve said employee of liability to plaintiff, it would not exculpate the defendant, Southern Railway Company. *Arrowood v. R. R.,* 126 N. C., 629, 36 S. E., 151. The railway company was liable in damages, if it failed to perform its indispensable duty to provide for a proper and vigilant lookout by an employee on said train, who by the exercise of due care, could have seen a person on its track, or in a position of peril, near its track, in time to avoid an injury to him from the moving train.

There was evidence that deceased could not have been seen by a person on the train at a greater distance than about 400 feet, because of a curve in the track; that deceased had gone upon the track as a licensee, and while lawfully walking thereon had become suddenly ill, and for that reason had sat down upon the end of the cross-tie; that he was sitting there as the defendant's train approached him in an apparently unconscious and therefore helpless condition, and that the train which was moving at a rate of speed not less than fifteen miles per hour, could not have been stopped at that point within less than 600 feet. It was negligence for defendant, Southern Railway Company, to operate its train in such a manner as that it could not be stopped before striking a person who had lawfully gone upon its track, and while walking thereon had suddenly become ill, and for that reason had sat down upon a cross-tie, where he remained in an apparently helpless condition. See *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237.

If the jury had found from the evidence that deceased by his own negligence contributed to the injuries which resulted in his death, then there was evidence from which the jury could have further found that notwithstanding such contributory negligence, the proximate cause of such injuries was the failure of defendants to exercise due care, after deceased could have been discovered, sitting on the end of the cross-tie, in an apparently helpless condition, to stop the train and thus avoid the injuries to deceased. The principle upon which the doctrine of the "last clear chance" is founded, is recognized and enforced in this jurisdiction, as just and necessary for the protection of human life. *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829.

This case falls within the principles upon which *Tyson v. R. R.,* 167 N. C., 215, 83 S. E., 318, was decided. These principles are well settled, and have been uniformly applied by this Court in decisions which are authoritative. Defendant cites and relies upon *Holder v. R. R.,* 160 N. C., 4, 75 S. E., 1094, and *Stout v. R. R.,* 164 N. C., 384, 80 S. E., 1118. These cases are commented upon by *Brown, J.,* in his opinion in the *Tyson case.* They are distinguished upon the facts from the *Tyson case.* They are not controlling in the decision of the question presented by this appeal.

It has been the policy of the law, certainly in this jurisdiction, as shown by numerous decisions of this Court, to hold railroad companies, and their employees, in charge of moving trains, to a high standard of duty towards persons who are or who may reasonably be expected to be on their tracks in front of a moving train. This policy is justified as tending to protect human life. That its vigorous enforcement may sometimes result in the recovery of damages in a case where upon its peculiar facts, the plaintiff does not seem to be entitled to damages does not require or justify a relaxation of well-settled principles. The judgment dismissing the action must be

Reversed.

G. M. CAGLE AND ELLEN CAGLE, HIS WIFE, v. G. L. HAMPTON.

(Filed 9 January, 1929.)

Wills—Construction—Estates and Interests Created.

A devise by the wife to her husband of all her property, real, personal and mixed, during his life to do with and use as he might desire, and after his death to M. in fee, "all that is left": *Held*, the husband received by the devise only a life estate in the lands and M. takes an estate in fee simple in remainder. Cases in which like devises are made with the power given to the devisee to sell during the continuance of the life estate distinguished.

APPEAL by plaintiffs from *MacRae, Special Judge,* at October Term, 1928, of HAYWOOD. Affirmed.

Rollins & Smathers for plaintiffs.
No counsel for defendant.

ADAMS, J. On 13 October, 1928, the plaintiffs and the defendant entered into a written contract by the terms of which the plaintiffs were to convey to the defendant certain tracts of land in consideration of $2,000 to be paid in four installments of $500, as agreed. Thereafter the plaintiffs prepared and tendered to the defendant a deed in fee with the usual covenants of warranty, and the defendant declined to accept it and to pay the purchase price on the ground that the plaintiffs are not seized of the premises in fee. The right to enforce specific performance of the contract turns upon the question whether the plaintiffs can convey the fee.

It is admitted that Martha Cagle, former wife of the plaintiff, G. M. Cagle, died seized of the lands in fee, leaving a will in which she devised to her husband all her "real, personal and mixed property during his life to do and use as he might desire, and after his death to Milton Cagle in fee, all that is left." It was held by the judge presiding that this devise vests in G. M. Cagle an estate for life and that the plaintiffs cannot convey the fee.

In *Carroll v. Herring,* 180 N. C., 369, the Court said: "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition."

An illustration of the principle last cited appears in *Chewning v. Mason,* 158 N. C., 578, the devise being as follows: "I give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of it as she sees proper." In reference to this item it was said: "The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. 'The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee.'" See *Long v. Waldraven,* 113 N. C., 337; *Parks v. Robinson,* 138 N. C., 269; *Darden v. Matthews,* 173 N. C., 186; *Roane v. Robinson,* 189 N. C., 628.

It will be noted that the life tenant was not by express terms given power to sell or otherwise dispose of the land. *Herring v. Williams,* 158 N. C., 1. The devise is similar to that in *Miller v. Scott,* 184 N. C., 556, in which the testator gave real and personal property to his wife, "to have and to hold and to use as she may see proper the balance of her life," with a provision that should any be left at her death, he would prefer it to go to a charitable institution. It was held that the wife took only a life estate—a conclusion which finds support in *Patrick v. Morehead,* 85 N. C., 62; *Griffin v. Commander,* 163 N. C., 230; *Burwell v. Bank,* 186 N. C., 117; *Darden v. Matthews, supra; White v. White,* 189 N. C., 236. The words "all that is left" were evidently intended to apply to personal property "whose use was its consumption." *Williams v. Parker,* 84 N. C., 90; *Brawley v. Collins,* 88 N. C., 605; *Herring v. Williams, supra.* Judgment

Affirmed.

T. F. HILL v. HELEN HILL.

(Filed 9 January, 1929.)

1. Divorce—Action for Absolute Divorce—Evidence of Adultery.

In an action against the wife for absolute divorce, evidence that she was given to profanity and evidence by a court record that her sister was arrested for disorderly conduct is irrelevant and incompetent upon the issue of adultery.

2. Same—Character Evidence.

In an action against the wife for absolute divorce, testimony on direct examination that she was guilty of profanity is incompetent as character evidence as being evidence of specific misconduct, and not as to her general reputation.

APPEAL by defendant from *Moore, J.,* at February Term, 1928, of BUNCOMBE.

Civil action for divorce, *a vinculo,* upon the alleged ground of adultery.

There is evidence on the record tending to show adultery on the part of the defendant, though her testimony in this regard is in direct conflict with that offered by the plaintiff.

Will Miller, a witness for the plaintiff, was allowed to testify, over the defendant's objection, as follows:

"Q. Have you ever heard any profanity being used by the defendant? A. Plenty of it.

Q. State the nature of the language used. A. Just as bad as could be. I have heard her curse as bad oaths as ever came from any man's throat, with the children there."

Again, over defendant's objection, plaintiff was allowed to show by court record that Gertrude Jones, sister of the defendant, who lived in the same house with her, was arrested in January, 1927, charged with disorderly conduct.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

No counsel for plaintiff.
Roberts, Young & Lane for defendant.

STACY, C. J. We think the evidence tending to show the use of profanity on the part of the defendant and the arrest of Gertrude Jones, charged with disorderly conduct, in this action for divorce, should have been excluded, seasonable objections having been made to its admission. It could hardly be said that either circumstance, on the facts of the present record, was relevant or competent to show the defendant's alleged adultery. *Shepherd v. Lumber Co.,* 166 N. C., 130, 81 S. E., 1064.

Speaking to the first question in *Nixon v. McKinney,* 105 N. C., 23, 11 S. E., 154, *Avery, J.,* delivering the opinion of the Court, said: "Particular facts are not admissible to prove the reputation of a party or witness to be either good or bad, for the reasons that they do not necessarily tend to establish a general character; that they confuse the jury by raising collateral issues, and especially that a party is presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specific charges against either without notice," citing as authority for the position: *Peterson v. Morgan,* 116 Mass., 350; Whart. on Ev., sec. 56; *S. v. Bullard,* 100 N. C., 486; *Barton v. Morphes,* 13 N. C., 520.

And in regard to the second, *Connor, J.,* speaking for the Court in *Martin v. Knight,* 147 N. C., 564, 61 S. E., 447, said: "It is clear that a paper-writing or record containing no information upon which an inference could be drawn in regard to the matter in controversy is irrelevant and inadmissible for any purpose."

For the errors, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

ŒTTINGER LUMBER COMPANY ET AL. v. W. I. ANDERSON & COMPANY ET AL.

(Filed 9 January, 1929.)

Appeal and Error—Record—Matters Not Set Out in Record Deemed Without Error.

For a reversal on appeal the appellant must show error, and where the record is silent as to evidence upon which the Superior Court judge has reversed the report of a referee the presumption is that there was evidence to support the finding, and his judgment thereon will be affirmed.

APPEAL by defendant, Ætna Casualty and Surety Company, from *Stack, J.*, at June Term, 1928, of GUILFORD.

Civil action by creditors to recover for materials furnished and labor performed in the erection of a cold storage plant in the city of Greensboro.

A reference was had under the statute which resulted in a finding and conclusion by the referee, on the crucial point in difference between the parties, that the Leaksville Lumber Company was liable as a principal on the bond in suit, Exhibit D, which finding and conclusion was reversed by the judge of the Superior Court, on exceptions duly filed thereto, it being found as a fact by the judge that the purported execution of said bond by the Leaksville Lumber Company was without authority on its part. To this finding the Ætna Casualty and Surety Company excepts, on the ground that said finding is not supported by the evidence, and appeals.

Brooks, Parker, Smith & Wharton, Hines, Kelly & Boren, Shuping & Hampton, Scott & Brewer and Broadhurst & Robinson for plaintiffs.

John N. Wilson for Ætna Casualty and Surety Company.

STACY, C. J. The evidence taken before the referee, and upon which the judge made his finding as to the nonliability of the Leaksville Lumber Company as principal on the bond in suit, is not incorporated in the record; hence we are not able to say that the finding is without any evidence to support it. The presumption is otherwise. *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593; *McGeorge v. Nicola,* 173 N. C., 707, 91 S. E., 708.

It is assumed, on appeal, in the first instance, that the judgment of the Superior Court is correct, and the party alleging error must show it. *Jones v. Candler, ante,* 382.

As no error has been made to appear, the judgment must be upheld.

Affirmed.

R. T. HEATON ET AL. v. L. L. HEATON ET AL.

(Filed 9 January, 1929.)

Mortgages—Registration and Indexing—Lien and Priority—Subsequent Purchasers.

The proper indexing of a mortgage upon lands is an essential part of its registration, and where the husband and wife make a mortgage on her lands which is only indexed by the register of deeds in the name of the husband, it is not good as against a subsequent purchaser for value by deed from the husband and wife that had been properly indexed and registered. C. S., 3561.

CIVIL action, before *Moore, J.*, at November Term, 1928, of CHEROKEE.

Maude K. Heaton was the owner of the land in controversy. On 19 January, 1924, Maude K. Heaton and her husband, L. L. Heaton, executed and delivered a mortgage to the plaintiffs upon said land to secure a note in the sum of $1,000, executed by L. L. Heaton to the Bank of Murphy, which said note had been endorsed by plaintiffs as accommodation endorser. The instrument was registered on 23 April, 1924, but was indexed and cross-indexed in the name of L. L. Heaton only. The name of Maude K. Heaton, the owner of said property, did not appear in the index or cross-index. Thereafter, on 26 September, 1924, L. L. Heaton and Maude K. Heaton, his wife, conveyed the land to the defendant, Mattie A. Taylor, for full consideration. The deed to Mattie A. Taylor was duly recorded on 27 September, 1924. The plaintiffs, having been compelled to pay the note, brought this suit against L. L. Heaton and his wife, Maude K. Heaton, and Mattie A. Taylor for the purpose of selling the land and applying the proceeds to the payment of said note.

A jury trial having been waived, the trial judge, upon the foregoing facts, decreed that the plaintiffs had no lien on said property, and that the defendant, Mattie A. Taylor, was the owner thereof, freed from the alleged claim of defendant.

D. L. Tillett and Moody & Moody for plaintiff.
D. Witherspoon for Mattie A. Taylor.

BROGDEN, J. The indexing and the cross-indexing of deeds, mortgages and deeds of trust is an essential part of the registration thereof. Therefore a deed, mortgage, or deed of trust not properly indexed and cross-indexed is not properly registered, and registration is necessary to defeat the rights of subsequent purchasers for value. N. C. Code 1927, sec. 3561, requires that "the names of the parties to all liens, etc.," shall be shown on the index. The indexing of the instrument in controversy did not comply with the statute; hence the ruling of the trial judge was correct. *Clement v. Harrison,* 193 N. C., 825, 138 S. E., 308.

Affirmed.

SAIDEE B. MEYER v. FENNER & BEANE AND J. P. MIDDLEMAS.

(Filed 9 January, 1929.)

Pleadings—Demurrer—Effect of Demurrer—Gaming.

A demurrer to a complaint on the ground that its allegations were insufficient to constitute a cause of action will not be sustained if, taking the pleading in its entirety it is sufficient in one or more of its parts; and where the demurrer is that the contract sued on was a wagering one and no recovery could be had under C. S., 2144, 2145, and two causes of action are alleged, if only one of them should be good the demurrer should be overruled.

APPEAL by defendant, J. P. Middlemas, from *McElroy, J.,* at September Term, 1928, of BUNCOMBE.

Plaintiff alleges that she had two classes of contracts with the defendants, Fenner & Beane, stock brokers, and their agent or manager, J. P. Middlemas, which netted her losses by reason of breaches of said contracts on the part of the defendants:

First, contracts to buy stock on "margins."

Second, contracts to purchase stock for actual delivery.

The defendant, J. P. Middlemas, demurred to the complaint on the ground that the contracts alleged were gaming contracts and therefore void under C. S., 2144 and 2145.

From a judgment overruling the demurrer, said defendant appeals, assigning error.

Jos. W. Little for plaintiff.
A. Hall Johnston for defendant.

STACY, C. J. Conceding that the first class of contracts may be void, because in violation of sections 2144 and 2145 of the Consolidated Statutes, still it would appear that the demurrer was properly overruled, as the second class of contracts does not seem to come within the purview of the statutes above mentioned. It is the established rule that where a general demurrer is filed to a complaint as a whole, if any count of the pleading is good and states a cause of action, the demurrer should be overruled. *Griffin v. Baker,* 192 N. C., 297, 134 S. E., 651.

A complaint must be fatally defective before it will be rejected as insufficient. *Blackmore v. Winders,* 144 N. C., 215, 56 S. E., 874. If any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand. *Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807.

A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting, for the purpose, the truth of the allegations of fact contained therein. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800; *Wood v. Kincaid,* 144 N. C., 393, 57 S. E., 4.

Affirmed.

N. H. FORESTER, D. E. SMOAK AND W. W. SMOAK, TRADING AS CENTRAL MOTOR COMPANY, v. LEONARD VYNE.

(Filed 9 January, 1929.)

Appeal and Error—Assignment of Errors—Necessity Therefor.

In order to sustain an appeal on the ground of the alleged failure of the judge to examine the evidence taken before a referee with a view to coming to his own conclusions before confirming the report, this fact must be made to appear, and exceptions thereto properly taken, it being required of the appellant to show error on appeal.

APPEAL by defendant from *Schenck, J.,* at June Term, 1928, of WILKES.

Civil action for an accounting and to recover amount which plaintiffs allege the defendant is indebted to them by reason of the sale of certain automobiles made under contract for the mutual account and benefit of plaintiffs and defendant.

As the case involves a long accounting, it was referred under the statute to Hon. W. C. Newland, who found the facts and reported the same, together with his conclusions of law, to the court, holding that plaintiffs were entitled to recover of the defendant the sum of $1,497.39 with interest and costs.

Exceptions were duly filed to the report of the referee, all of which were overruled, and the report was approved by the judge of the Superior Court; judgment was thereupon entered in favor of the plaintiff, from which the defendant appeals, assigning error as follows: "The first and only exception was to the signing of the judgment of his Honor, Michael Schenck."

Frank D. Hackett and J. H. Burke for plaintiffs.
John R. James, J. H. Whicher and J. M. Brown for defendant.

STACY, C. J. The defendant contends in his brief that under the decision in *Thompson v. Smith,* 156 N. C., 345, 72 S. E., 379, the judgment should be vacated because the judge did not examine the evidence with a view to forming his own conclusions, but simply adopted the report of the referee, as there was some evidence to support the referee's finding of fact. In answer to this position, it is sufficient to say that the same is not apparent from the record and the question is not presented by any assignment of error.

The burden is on the appellant to show error; it is not presumed. *Jones v. Candler, ante,* 382; *In re Ross,* 182 N. C., 477, 109 S. E., 365.

Affirmed.

DAVID GOINS v. J. D. SARGENT AND NORTH CAROLINA GRANITE CORPORATION.

(Filed 9 January, 1929.)

1. **Pleadings—Complaint—Amending Complaint—Actions—Judges.**

   The judge of the Superior Court has within his sound discretion the statutory authority to permit the plaintiff to amend his complaint when thereby the ground of the alleged cause is not so substantially changed as to become a new or different cause of action, and *Held,* in this action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, C. S., 4477, 4478, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. C. S., 513.

2. **Master and Servant—Relation—Discharge and Conspiracy to Prevent Servant Being Employed By Others—Trade Unions—Demurrer.**

   Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc.: *Held,* the employee is entitled to recover damages in his civil action against his former employer, and a demurrer *ore tenus* to a complaint setting forth this cause of action is bad. C. S., 447, 448.

3. **Same—Burden of Proof—Malice—Damages.**

The provisions of C. S., 4477, 4478, allowing a discharged employee to recover damages in a civil action against his former employer for a conspiracy to deprive him of getting employment from others is remedial and does not put the burden upon the plaintiff of showing either malice or actual damages.

4. **Appeal and Error—Review—Interlocutory, Collateral, and Supplementary Proceedings; Premature Appeals—Demurrer.**

Upon the overruling of a demurrer to the sufficiency of the complaint in alleging a cause of action, an appeal to the Supreme Court immediately lies.

APPEAL by defendants from *MacRae, Special Judge,* at March Term, 1928, of SURRY. Affirmed.

Action by plaintiff, a discharged employee of defendants, to recover damages, upon his allegation that defendants unlawfully prevented plaintiff from obtaining employment, after his discharge, by other persons, firms, or corporations, thereby causing plaintiff damage in a large sum.

From judgment overruling their demurrer, *ore tenus,* to the complaint, for that the facts stated therein do not constitute a cause of action, defendants appealed to the Supreme Court.

Holton & Holton, A. E. Tilley, D. L. Heath and R. C. Freeman for plaintiff.

W. F. Carter and Folger & Folger for defendants.

CONNOR, J. Plaintiff is a stonecutter, and is dependent upon his employment as such for his livelihood. Prior to 1 January, 1922, he was employed by defendant, North Carolina Granite Corporation, as a stonecutter, at its quarry in Surry County, North Carolina. The said defendant was then and is now engaged in the business of quarrying and cutting stone for use in the erection and construction of buildings. Defendant, J. D. Sargent, is the manager and one of the owners of said corporation. On or about 1 January, 1922, plaintiff was discharged from the employment of defendants. He has sought employment as a stonecutter by other persons, firms and corporations, in this State, who required the services of stonecutters, but has failed to obtain such employment. Although a citizen of this State, he has been compelled to go to other states to obtain employment at his trade, thus being separated from his wife and children, and suffering great inconvenience, sacrifice and annoyance, all to his great damage in the sum of $10,000.

Defendants have notified other persons, firms and corporations, doing business in this State, and requiring for their said business, stone quarried and cut by defendants, that defendants will not deliver such stone to any person, firm or corporation who shall employ or who shall retain in his, their or its employment, the plaintiff. By this means defendants have prevented plaintiff from obtaining employment as a stonecutter, in this State, by other persons, firms or corporations, who would otherwise have employed him, or retained him in their employment. Defendants have thereby compelled plaintiff to leave the State, in order to obtain employment, thereby "causing him to lose time for nearly a year, forcing him to go to the city of Philadelphia, in the State of Pennsylvania, to obtain work, at great inconvenience, sacrifice and annoyance, and compelling plaintiff to leave his wife and children, thus causing him great mental anguish and distress." By such unlawful conduct on their part, defendants have caused plaintiff damage in the sum of $10,000.

The only ground upon which defendants discharged plaintiff from their employment, and the only ground upon which they have refused and declined to deliver stone to any person, firm or corporation in this State, who shall employ plaintiff, or who shall retain plaintiff in their employment, is that plaintiff was, while in the employment of defendants, a member, in good standing, of an organization of stonecutters, known as G. C. I. A. This organization was authorized and maintained under and pursuant to the laws of the State of North Carolina.

The foregoing are the essential facts alleged in the complaint, and for the purposes of this appeal admitted to be true by the demurrer of defendants. The question presented for decision is, whether these facts, under the law of this State, constitute a good cause of action for damages.

In the original complaint filed in this action, to which defendants filed answers, in which they denied the essential allegations therein, there was no specific allegation to the effect that plaintiff had been employed by defendants and had been discharged from such employment, prior to the conduct of defendants, which plaintiff alleged was the cause of his damage. After the jury had been empaneled, for the trial of the issues raised by the pleadings, plaintiff took a voluntary nonsuit as to the second cause of action alleged in the complaint. Defendants, thereupon, demurred, *ore tenus*, to the complaint, for that the facts stated therein, as the first cause of action, were not sufficient to constitute a cause of action. The demurrer was overruled and defendants excepted. Thereupon, plaintiff moved for leave to amend his complaint, by inserting therein an allegation specifically alleging that he had been employed by defendants, and had been discharged from such employment, prior to the conduct of defendants by which they had prevented him from obtaining employment by other persons, firms or corporations, in this

State. This motion was allowed, and defendants excepted. The complaint was amended by leave of the court.

Defendant's contention that the court was without power to permit the amendment, for that thereby a new cause of action was alleged, cannot be sustained. It is immaterial now, whether the demurrer to the first cause of action, as set out in the original complaint, after the voluntary nonsuit was taken as to the second cause of action, was properly overruled or not. It may be conceded that there are decisions in other jurisdictions in support of defendants' contention that no cause of action was stated in the original complaint, and that the decision of this Court in *S. v. Van Pelt,* 136 N. C., 633, 49 S. E., 177, is apparently an authority in support of this contention. However, it should not be overlooked that *S. v. Van Pelt* is a criminal action upon an indictment charging a conspiracy, whereas the instant case, upon the first cause of action, as alleged in the original complaint, is a civil action for damages resulting from a conspiracy to which defendants were parties. In 12 C. J., 581, it is said: "While one who suffers from a conspiracy forbidden by the criminal law may maintain a civil action for damages caused by the parties to the combination, it is not essential to civil liability for a consummated conspiracy to do an unlawful act, that the means resorted to to effect the purpose, should be criminal, or that the act should be criminal. It is sufficient if it be to commit an act wrongful because of its affording a ground of action, civilly or criminally." See cases cited.

This, however, is not determinative of the question presented by defendants' assignments of error, based upon the exception to the order of the court permitting the amendment to the complaint. In *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022, it is said: "Under the statutes regulating our present system of procedure, Revisal 1905, sec. 507 (now C. S., 547) *et seq.,* and numerous decisions construing the same, the power of amendment has been very broadly conferred, and may and ordinarily should be exercised in furtherance of justice, unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that, where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit." The principle has been subsequently stated and applied in *Gadsden v. Crafts,* 175 N. C., 358, 95 S. E., 610; *McLaughlin v. R. R.,* 174 N. C., 182, 93 S. E., 748; *R. R. v. Dill,* 171 N. C., 176, 88 S. E., 144. In each of these cases the power of the court to allow an amendment to a pleading was sustained. It is expressly provided by statute that "if a demurrer is filed, the plaintiff may be allowed to amend."

C. S., 513. Where a demurrer is filed to a complaint, either written or *ore tenus,* upon the ground that the facts stated therein are not sufficient to constitute a cause of action, it cannot be held that the court is without power, in its sound discretion, and in furtherance of justice, to permit an amendment to the complaint, which shall clearly meet the objection upon which the demurrer is filed. In proper cases the amendment should be permitted upon such terms, as the court may deem just to defendant, as for instance, a continuance of the trial, in order that defendant may prepare his defense to the amended complaint. In the instant case it is not suggested that defendants were prejudiced by the amendment. There was no error in permitting plaintiff to amend his complaint, after defendants had demurred thereto, upon the ground that the facts stated therein were not sufficient to constitute a cause of action.

Defendants' demurrer, *ore tenus,* to the amended complaint, for that the facts stated therein are not sufficient to constitute a cause of action, was properly overruled. The facts alleged therein constitute a cause of action, under the laws of this State, upon which plaintiff, a discharged employee of defendants, who has been prevented by the conduct of defendants from obtaining employment by other persons, firms or corporations in this State, is entitled to recover of defendants penal damages. Sections 4477 and 4478, of the Consolidated Statutes of North Carolina, 1919, which are sections 1 and 2 of chapter 858, Public Laws 1909, are in these words:

"4477. *Blacklisting employees.* If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent, or corporation shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge."

"4478. *Conspiring to blacklist employees.* It shall be unlawful for two or more persons to agree together to blacklist any discharged employee, or to attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court."

The foregoing statutes have been construed by this Court in *Seward v. R. R.,* 159 N. C., 242, 75 S. E., 34. It is there held that the statutes do not attempt to interfere with the right of an employer to discharge an employee for cause, or without cause. They do not seek to prohibit an employer from communicating to other employers the nature and character of their employees, when the facts would be for their interest. The purpose of the statutes is to protect employees in the enjoyment of their natural rights and privileges guaranteed them by the Constitution, viz., the right to sell their labor and acquire property thereby. *Allen, J.,* writing for the Court, says:

"Prior to the ratification of the act of 1909, statements as to the character and competency of discharged employees were frequently made voluntarily, and not upon request, and were sometimes prompted by malicious motives, when the motive was difficult of proof; when malice and the loss of service, as the result of the statement were proven, the damages were difficult of admeasurement; and where there was no loss of employment, but a mere attempt to prevent the employee from obtaining it, no compensatory damages could be awarded. The act remedies these defects, and under its provisions a statement as to the standing of a discharged employee is not privileged, unless made upon request; and whether privileged or not, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employee from obtaining employment, the jury may award penal damages."

In the instant case defendants, having discharged plaintiff from their employment, solely because he was a member of an organization, authorized by the laws of this State, notified other persons, firms or corporations, who would otherwise have employed plaintiff as a stonecutter, of the fact of such discharge, and of the ground for the same, and advised such persons, firms and corporations, that if any person, firm or corporation employed plaintiff as a stonecutter, or in any capacity, defendants would refuse to deliver stone to such person, firm or corporation. This notice was given by defendants without any request, in writing or otherwise, for the same. It was given not to promote the interests of defendants, or of other persons, firms or corporations, but to prevent plaintiff from obtaining employment in this State. If these facts, now admitted by the demurrer, are established, at the trial, by a verdict, then by reason of the statute, plaintiff will be entitled to recover of defendants penal damages to be assessed by the jury.

By virtue of the statute, plaintiff is not required to allege or prove malice or actual damages; both are presumed. The General Assembly of this State evidently thought it just to relieve discharged employees, who were prevented by former employers from obtaining employment by other persons, firms or corporations, by notice of the fact and ground for the discharge, without request, of the burden of proving either malice or actual damages. The right of a prospective employer to obtain from former employers, truthful statements as to the ground of the discharge is fully safeguarded by the provisions of the statute. The statute has now been in force in this State for twenty years, without amendment or alteration. It serves a useful purpose and has evidently met with the approval of the people of this State.

The suggestion in plaintiff's brief that this appeal is premature, and should be dismissed for that reason, does not require discussion. The demurrer was to the whole cause of action alleged in the amended complaint; it was not frivolous. An appeal lies to this Court from the order and judgment overruling the same. *Joyner v. Fibre Co.,* 178 N. C., 634, 101 S. E., 373. The judgment is

Affirmed.

CHARLES F. MURPHY, ADMINISTRATOR OF WEAVER MURPHY, v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 9 January, 1929.)

1. **Electricity—Liability for Injuries Caused Thereby—Evidence of Negligence.**

Where there is evidence tending to show that the plaintiff's intestate was killed by catching hold of a wire fence to which a high voltage of electricity has been transmitted by induction from a heavily charged wire of the defendant negligently coming in close proximity with it, that the intestate was badly burned on his hands and body with other evidence of burning along the fence: *Held,* not prejudicial error to defendant for plaintiff's witness to testify that as defendant's employees were finishing making the place safe he told them in response to their inquiry that if they had heard it "popping and cracking" they would have thought it had burned much, there being other evidence to that effect.

2. **Same—Res Ipsa Loquitur.**

The doctrine of *res ipsa loquitur* applies when the evidence discloses that the plaintiff's intestate, a thirteen-year-old boy, was killed by a deadly voltage of electricity from a wire fence, with further evidence that the wire fence was charged by an induced current caused by a heavily charged transmission wire coming in close proximity thereto.

3. **Same—Nonsuit.**

Evidence tending to show that the plaintiff's intestate, a lad thirteen years of age, and being where he had a right to be, was killed by a high voltage of electricity from the defendant's transmission wire, that the defendant had been notified in time to cut off the current, which under the circumstances could have been done in a very short time, and the injury, subsequently occurring, could have been thus avoided, is sufficient to take the case to the jury upon the actionable negligence of the defendant in causing the death, and under the facts of this case, contributory negligence does not arise.

4. **Trial—Instructions—Requests for Instructions.**

Where the instructions of the court fully and substantially cover the law of the case, the plaintiff must submit special requests for instructions on any particular phase of the evidence he may desire instructions.

5. **Appeal and Error — Review — Discretion of Court — Setting Aside Verdict for Excessive or Inadequate Damages.**

A motion to set aside a verdict for excessive damages is addressed to the sound legal discretion of the trial judge and is not reviewable on appeal.

6. **Trial — Taking Case or Question From Jury — Nonsuit — Waiver — Motions.**

A defendant to an action waives his right to object to the sufficiency of the evidence by not making a motion as of nonsuit at the close of the plaintiff's evidence and renewing the motion at the close of all the evidence in the case.

APPEAL by defendant from *H. Hoyle Sink, Special Judge,* and a jury, at May Special Term, 1928, of BUNCOMBE. No error.

This is an action for actionable negligence brought by Charles F. Murphy, administrator of Weaver Murphy, for the death of his son, Weaver Murphy.

Defendant is engaged in the business of furnishing and selling electricity. One of its principal places of business is in Asheville, N. C., and the electric current is transmitted over its power lines to the surrounding section. There was a power line of defendant company running through the Newfound section in Buncombe County, N. C. Charles F. Murphy lived in that section and farmed, and the Power Company's lines ran through the farm he leased. He was also deputy fire warden. He had a son, the deceased, Weaver Murphy, 13 years of age. He was going to school while in session. He was "bright in his books, learned quickly," physically good and obedient. The boy had been told if he happened to see any fire to go to it and control it, and if necessary to call in others. On 27 April, a few minutes after 1 o'clock p.m., his father sent him to a store some half a mile away to get some fence staples and nails. His son did not return, and the father went and searched for him. His father testified: "I found him hanging to a wire fence; he was dead; it was 7:30 p.m., when I found him clinging to a wire fence; he had hold of the wire with his right hand underneath, and on top with his left hand, and he took hold of it like a man would to bring it down to crawl through it, and he had a tight grip on it. I pulled his hands loose from the wire with my hands; his body was apparently cold. I found burns on him and his clothes were burned pretty bad. When I pulled his hands loose from the wires, it pulled some of the skin off his hands and left the skin on the wire; his hands were burned all right. Where I found the boy there was some burns about the side of his face and his hip where he laid against the fence and the shoulder which was next to the wire was burned pretty bad. The shrubbery all along the wire was burned off and killed, and then there was some beyond where he was found burned and killed. . . . I didn't know why he would go over there unless he went to see about the fire. I didn't send him over there at all, but I supposed he went there. There was fire over there in the edge of the woods. You could see the smoke from that fire from the road the little boy went along as he went to the store."

One Reeves testified: "I came something like fifteen minutes of 12 o'clock for dinner, and was washing and my wife was in the kitchen there and said, 'What is that making that fuss?' The wire had come down. I said, 'Sounds like an airplane.' I couldn't see it. She said, 'Come here, there is something on fire.' She said, 'It is that power line down,' and I stepped out in the yard where I could see and I said, 'Yes, it is a wire down,' and I said, 'You go and call the Power Company,' and she said, 'I don't know who to call,' and I said, 'Call the operator at Leicester; she can call them, and tell them to cut off the line. It is burning up things there.'"

Q. "Is this the lady that was the switchboard operator at Leicester?" A. "Yes, sir. She tried to call her and said the phone was popping and cracking so she couldn't handle it. I said I would try and get Mrs. Brooks to understand the power line was down, and for them to cut it off, it was dangerous; my cows were in the field. My clock said fifteen minutes to twelve when I used the phone—phoned Leicester; there is a phone line at Leicester that connects with Asheville; that phone line was taken care of that evening some time. I don't know what time it was repaired. I did not see the men come out there. It was about twenty minutes of two o'clock, and it was still popping and cracking—that's by my clock."

Mrs. L. C. Brooks testified: "In my home he (Weaver Murphy) was nice and polite, and seemed all right in every way. His physical appearance was good. I would think he was fairly well developed for a boy of that age. I operated the switchboard at Leicester at the time of his death. There is a telephone line extending up the Newfound section; there was a line went into the home of Mr. Reeves. I remember Mr. Reeves calling me, but at that time I had already called the power trouble. . . . He said the line was down, and I called them and told them they had a line down. I called to the Power and Light Company here in the city. I got connection with them. The first time I called I told them I had a line out of order—a telephone line out of order—caused by the power line; it caused my line to be out of order. The next time I called I told them I had been notified that they had a wire down on Newfound—an electric wire down on Newfound—and they said they would send a man right out. That was somewhere along about noon hour; it was somewhere around the middle of the afternoon that the trouble cleared up some. . . . Of course it didn't get clear the whole afternoon. . . . It was just a few minutes after I got this information until I got the Power Company—just as soon as I could call the Asheville operator and she got me a connection with the Electric Company men with a man on the line; it was just a few minutes before Mr. Reeves called that I saw this trouble and phoned them. I went on the line and thought some one was calling me and discovered the trouble. I got a reply from the Power Company that they would send a man out immediately. . . . This was in the Newfound section. I again called the Power Company after Mr. Reeves called me. I told them I had been notified they had a wire down on the Newfound line I had called about. I didn't know the first time what the trouble was. I told them I had a line out of order, caused by the power line. I don't know who I talked with when I first called. I never do ask who answers the phone since they have the number changed. I asked for the trouble man; at that time they had no switchboard; I called for the trouble man. I have always done that since I have been calling the electric people."

H. A. Ballard, maintenance superintendent of defendant, testified: "I am not familiar with the survey of the Canton line—the line that runs out Newfound to Canton. That line was built for 44,000 voltage. The line ordinarily carried 44,000. I couldn't say that I was familiar with the place where the switch is on that line. I know we have disconnections in the Weaver section, as it is known in the Carolina Power Company. They have disconnections on the line, but I don't know how many. There is a power station. I know where it is. This power can be taken off by a disconnect. I don't know whether they have an oil switch on their line or not at that time, but I think they have. This disconnection of theirs is controlled by one pull of the handle; three switches are pulled out at once, as I remember it. The operator would have to go one hundred feet and cut the power off by pulling a lever."

J. B. Rogers testified: "I was plowing on the north side of the creek right opposite where the boy was killed, or where the wire was down. I heard a noise, and it was sort of cloudy and the wind blowing a little, and I thought probably the lightning struck the wire; it kept crackling and popping, and I noticed the sparks flying, and I went on with the plowing, and a little later on I heard it again. I know where this pole that has been spoken of by the witnesses is. It is pretty close to the cross fence. I wouldn't say exactly how close, but pretty near the fence. The fence is a wire fence tacked on the post. This high voltage wire that has been spoken of hung right over that wire fence. I first began to hear this popping somewhere near two o'clock. It was after I went out to my work. I didn't notice exactly what time. I saw some sparks and smoke—sparks going from the wires and places catching on the fence—and I also saw some smoke up near the edge of the woods. I don't think the woods were set afire. There were leaves burned and just some rotten logs by the fence. . . .

(This witness went with Chas. F. Murphy and found the boy about 7:30.)

"I went along down the fence ever so far, and directly I discovered the boy hanging up on the fence with his hands to the fence—fell back against it. . . . Afterwards I was over there and noticed some of those wires looked like they had been melted and burned with some kind of heat. I saw some shrubbery and bushes scorched. I found them on both lines. I would think it was right around three o'clock when I saw some men come there; maybe a little later; I wouldn't take no less. The first I noticed of them they ran up there near the burning and stopped the truck. I didn't know who they were until after they got done and started through the field. I saw their fixtures and I knew it was men going up there to fix the line. I believe there were as many as three, maybe four. I didn't pay any attention to the kind of truck they came in. They went up to this pole that has been spoken of. I saw them looking around there, and then I could see them drawing up something like they were fixing it. They were insulators, looked to me like. They were getting the thing they were drawing up from below—looked like from the ground up. I couldn't see the wire that far. I don't know how long they worked there; they weren't there so awfully long."

U. F. Ford testified: "I was there in the road loading logs there, and this line was down over there in the field at this post, and Mr. Clark there and his force came up and fixed the line up while I was loading the logs there, and come back and got in the truck and went off. It was about 3 o'clock."

S. A. Johnson, superintendent of Power Company, testified: "I was superintendent of lines, power houses and construction and general work. I am familiar with the Weaver power plant. I built it. It was the place where the power line which leads to Canton went from at that time. Those lines leading to Canton are called 'three-phase,' three lines; they are not insulated wires; the voltage is 66,000. I believe from 1,700 to 2,000 volts ordinarily is used in electrocuting a man. On April of last year there were two switches on there. There is a switch on the 6,600 volt side that goes through the transformer and steps up to 66,000, and on the 66,000 volt side there is also a set of automatic switches on the 66,000 volt side. There are telephone communications in the power house. It would take about a half minute to cut off the power on that line after receiving notice of trouble on it; that kills the line. . . . I did not have anything to do with repairing the line; they had it repaired when I got back; they have instrument on the boards at this power house to show when the line gets down and is grounded, but as long as the line don't get down and isn't grounded it doesn't show it. They are ampmeters and various kinds that show load. When the load goes up high enough the current trips the automatic switch, but in this instance the wire was swinging something like eighteen inches above the fence—wasn't touching it. If that had been down on the wire, I know well enough if it had been down and made a ground it would have knocked it out. I have been there too much and seen it happen. I don't know of my own knowledge when it did knock it out. I only know what the men told me. If the wire should be near to a wire fence over which it passed it would have electrified the wire fence without being in contact with it; that is what is called an induced current. That would not register on the automatic signals because the ground wasn't heavy enough, if it got close enough depending upon the degree of contact. If it had been down where it got a ground the automatic instruments would have worked. I don't know whether they did work or didn't—only what I was told. If they had worked they wouldn't have been able to have kept them in. They are so automatic when it goes down you can put it right back in like that and there is no keeping it there."

Robert S. Shook testified: "I have driven by from Newfound to Asheville in a Ford. As to the way I drive I wouldn't come as quick as a whole lot of men because I am a bad driver. It was a good time before I ever learned to get here and back. I had several wrecks. I don't know what was wrong this morning. I left home 15 minutes to 8, and when I got to the square it was 20 minutes after eight, and I drove very common I thought—that is 35 minutes. I wasn't trying to make any time. . . . Just an ordinary way it would take him 10 to 15 minutes."

The plaintiff alleges: "Par. 18. That on 27 April, 1927, the plaintiff's intestate, the said Weaver Murphy, without knowledge of the fact that said fence was charged with said deadly and invisible agency, and electric current, attempted to pass through the wire fence connected with the fence which was charged as aforesaid, when immediately upon touching the said fence his hands, neck and body were attracted and held fast thereto by the deadly and powerful force of said electric current, which current then and there literally burned alive and electrocuted the plaintiff's intestate, whose lifeless form, many hours after his electrocution, was found still resting against the wires of said fence."

The defendant answered: "That the allegations contained in paragraph 18 of the complaint are, upon information and belief, denied, except that the defendant admits that the plaintiff's (intestate came in contact with) current furnished by this defendant, and in consequence thereof lost his life, but the defendant alleges that said death was caused by an accident and by or through means which could not have reasonably been foreseen or provided against. . . . And for further defense the defendant says that if the plaintiff's intestate, Weaver Murphy, came to his death by reason of having come in contact with a wire fence which had been charged by electricity from one of the defendant's wires, then that such condition was brought about by an accident or by the unforeseen and unpreventable effects of the weather or by a windstorm or other unavoidable occurrence over which the defendant had no control; in consequence of which its electric wire was caused to fall upon said fence, and that defendant had no notice of said condition and that it had not existed for a sufficient length of time for the defendant to have sufficient notice thereof, and in consequence the defendant is not liable and is not guilty of any negligence which caused the death of the plaintiff's intestate."

When the plaintiff rested his case, the defendant rested. Whereupon, the court was advised by counsel for the plaintiff and the defendant that no issues had been prepared; whereupon the court stated to counsel that no issue of contributory negligence arose upon the pleadings or the evidence, which was concurred in by counsel for the plaintiff and the defendant. Therefore, the court suggested that the two usual issues of negligence and the amount of damages would be all that would be required. This, likewise, was concurred in by counsel for both sides. Whereupon, the court proceeded to dictate to the court reporter the issues that are shown in the record. When written up, the court personally placed before counsel for plaintiff and the defendant copy of the issues, which copies were used by each of counsel and referred to by them in their respective arguments to the jury. No objection was made to the court relative to the issues during the trial.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the defendant guilty of negligence as alleged in the complaint? Answer: Yes.

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"2. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $23,000."

The material assignments of error and other necessary evidence will be set forth in the opinion.

Wells, Blackstock & Taylor and J. E. Swain for plaintiff.
Martin & Martin and Rollins & Smathers for defendant.

CLARKSON, J. One Rogers, a witness for plaintiff, was asked the following question: "Did you have any conversation with any of them, and, if so, what did they say?" A. "One of the gentlemen said to me, 'Did it burn much?' and I said, 'You would have thought it burned if you could have heard it popping and cracking,' and they said, 'I don't think there is any danger now; we have fixed it back.' That is all we said." Defendant contends this was error. We cannot so hold. This conversation took place five or ten minutes after the repair force had fixed the power line and before the repair force had gotten back in the truck that they came in, and while the witness was nearby looking at what was being done by the repair force.

All the evidence, on this aspect, was to the effect that it burned and there was popping and cracking. It was a matter of sight and common knowledge that when the wires charged with electric current were stretched high above the fence, which the witness saw the repair force do, that there would be no danger. The superintendent of the line, a witness for plaintiff, stated if the wires should be near to a wire fence over which it passed it would have electrified it without being in contact with it, and that is what is called "induced current." All the evidence was to the effect that the power line was out of repair. Mr. Reeves testified, "She said, 'It is that power line down,' and I stepped out in the yard where I could see and I said, *'Yes, it is a wire down.'* " The telephone operator at Leicester was immediately called up and *told that the line was down.* The telephone operator notified defendant, *"I told them I had been notified that they had a wire down on Newfound,* and they said they would send a man right out—that was something along about the noon hour." U. F. Ford testified: "I was there in the road loading logs there and *this line was down* over there in the field, at this post, and Mr. Clark there and his force came up and fixed the line up while I was loading the logs there, and came back and got in the truck and went off. It was about three o'clock." We can see nothing prejudicial in the question and answer from the facts disclosed by this record. The company knew its line was down and dangerous, and sent men out to fix it, which they did.

The cases cited and the principle of *res gestæ* invoked by the defendant are not applicable. We may say that the observation in 10 R. C. L.,

p. 975, has a bearing: "It is not easy always to determine when a declaration is a part of the *res gestæ*. It is dependent upon the particular circumstances under which the declaration is made. The courts recognize the difficulty of laying upon this subject a rule that may be applied in every case. The tendency of recent adjudications is to extend rather than to narrow the scope of the introduction of evidence as part of the *res gestæ*."

A witness, Robt. S. Shook, was asked, "Did you notice his body? Describe his appearance—the body of the child." A. "His hands were gripped that way (indicating), and we had to pull them open to see the inside of the hands. They were burned and scorched and scars on his neck and one little one up here, and on this hip here down almost on that, was a place bigger than my hand—just looked cooked—the flesh was just cooked at three or four places on the back of his shoulder, back here—just different places."

The defendant, at the time, objected that in view of the admissions in this case that it was not material. Similar evidence of the boy's father was introduced by plaintiff without objection. The testimony tended to show how excessive and deadly the voltage was. Defendant contends this was error. We cannot so hold. *McAllister v. Pryor,* 187 N. C., at p. 839.

In *Ellis v. Power Co.,* 193 N. C., at pp. 361-2, it is said: "Those who are engaged in the electric business are held by the courts to the highest degree of care in the manufacture, distribution, maintenance and inspection. . . . Electric power is an industry-producing agency, and the hydro-electric development has been one of the greatest factors in the State's progress, and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes and elsewhere. On the other hand, the highest degree of care should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power."

"The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer. Sher. and Redf., on Negl., sec. 59; *Shaw v.*

Public-Service Corp., 168 N. C., p. 618." *O'Brien v. Parks Cramer Co.*, *ante*, 359. It is well settled from the facts here disclosed that the principle of *res ipsa loquitur* applies.

The matter has been so thoroughly considered in this jurisdiction that we refer to some of the cases on the subject: *Haynes v. Gas Co.*, 114 N. C., 203; *Mitchell v. Electric Co.*, 129 N. C., 169; *Turner v. Power Co.*, 154 N. C., 131; *Shaw v. Public-Service Corp.*, 168 N. C., 611; *McAllister v. Pryor*, 187 N. C., 839; *Graham v. Power Co.*, 189 N. C., 381; *Helms v. Power Co.*, 192 N. C., 784; *Ramsey v. Power Co.*, 195 N. C., 788; *O'Brien v. Parks Cramer Co.*, *supra*.

Outside of the principle of *res ipsa loquitur*, which applies, defendant was notified about the defect about a quarter to 12 o'clock. (1) Defendant was notified before 12 o'clock, and from the evidence had ample time to come and repair the power line that transmitted this dangerous and subtle power that was "popping and cracking" before the boy was electrocuted. He was sent to the store by his father after 1 o'clock. (2) H. A. Ballard, the maintenance superintendent, testified: "This disconnect of theirs is controlled by one pull of the handle; three switches are pulled out at once, as I remember it; the operator would have to go one hundred feet and cut the power off by pulling a lever." S. A. Johnson, superintendent, testified: "It would take about a half minute to cut off the power on that line after receiving notice of trouble on it; that kills the line."

The lad was 13 years of age. In a case of this kind, plaintiff's intestate was not guilty of contributory negligence. *Graham v. Power Co.*, 189 N. C., 381, and cases cited. See *Brown v. R. R.*, 195 N. C., 699. Defendant failed to plead contributory negligence. It was not entitled to the issue. C. S., 523. *Fleming v. R. R.*, 160 N. C., 196; *Moore v. Chicago Bridge, etc., Works*, 183 N. C., 438.

It may be noted that the exceptions to the charge do not comply with the rules. *Rawls v. Lupton*, 193 N. C., 428. If our brethren at the bar will examine that case they can readily make up a case on appeal to this Court in accordance with the well settled rules.

We do not think there is any error in the charge, and it complies with C. S., 564. The court below defined, in accordance with all the authorities, the law of negligence, proximate cause and damages. The contentions were fairly given on both sides. The case is not complicated as to the law or facts. The jurors are presumed to be men of "good moral character and sufficient intelligence."

In *Alexander v. Cedar Works*, 177 N. C., at p. 149, it is said: "If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted.

Simmons v. Davenport, 140 N. C., 407; *Potato Co. v. Jeanette,* 174 N. C., 237." *Davis v. Long,* 189 N. C., at p. 137; *O'Brien v. Parks Cramer Co., supra.*

The defendant complains of the amount of the verdict—the value of the life of the boy, as fixed by the jury. The court below refused in its discretion to set the verdict aside and grant a new trial.

In *Hyatt v. McCoy,* 194 N. C., at p. 762, it is said, quoting numerous authorities: "It is provided by statute that the judge who tries the cause may in his discretion entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial . . . for excessive damages (C. S., 591); and it has been said 'That there is no reason which can be advanced in favor of setting aside verdicts because of excessive damages which does not apply to setting aside for inadequacy of damages.' *Benton v. Collins,* 125 N. C., 83. So it has been held in a number of cases that to set aside a verdict and to grant a new trial for excessive or inadequate damages is, as a rule, the irreviewable right of the presiding judge."

In the present case defendant did not make a motion for judgment as in case of nonsuit at the close of plaintiff's evidence nor at the close of all the evidence, that the evidence was not sufficient to be submitted to the jury, under C. S., 567. The law is well settled by numerous authorities that the matter is waived as to the insufficiency of the evidence to be submitted to the jury on the question of negligence.

In *Nowell v. Basnight,* 185 N. C., at p. 148: "If the first motion is overruled, the defendant may except and go to the jury; or except, introduce evidence and renew motion after all the evidence. . . . Exception is waived if motion is not renewed (citing authorities)." In the above case the change of practice, under C. S., 567, is lucidly discussed by *Walker, J.* On the whole record we can find

No error.

R. L. SNELSON & COMPANY v. R. G. HILL & COMPANY ET AL.

(Filed 9 January, 1929.)

1. Principal and Surety—Remedies of Creditor—Surety Bonds for Public Improvements—Banks.

A bank loaning money to a contractor to build a public highway for a certain township in a county may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose.

2. **Same—Labor and Materials Used or Necessary to Construction.**

The compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety on the contractor's bond where the bond is given in conformity with the statute. C. S., 2445.

3. **Same—Appeal and Error.**

Appellant must show error on appeal, and where the judge of the Superior Court approves the report of the referee in holding that the services of an employee upon a county highway were not covered by the surety bond, this judgment will be upheld when the record is silent as to the character or necessity of the work for which compensation is claimed.

4. **Same.**

Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for.

APPEALS by intervener, East Tennessee National Bank, and defendant, Southern Surety Company, from *Harwood, Special Judge,* at March Term, 1928, of SWAIN.

Civil action by creditors (general creditors' bill) to recover for materials furnished the contractor and labor performed in and about the construction of a highway in Swain County, and to hold the surety on the contractor's bond liable for the payment of said claims. Certain interveners also assert the right to enforce their claims against the surety on said bond.

The general fact situation may be stated as follows:

1. On 29 June, 1925, R. G. Hill & Company, contractor, entered into a written agreement with the Highway Commission of Forney Creek Township (Swain County) for the construction of a highway known as Projects 3 and 4, in which contract it was stipulated, among other things, that "the contractor shall and will provide and furnish all the materials, machinery, implements, appliances, and tools and perform the work and labor required to construct and complete Projects 3 and 4 located in Swain County . . . according to the proposal, plans and specifications prepared by said Commission," etc.

2. In pursuance of its duty under C. S., 2445, as amended, and for a valuable consideration, the Forney Creek Highway Commission, on 29 June, 1925, took from the contractor, as principal, and the Southern

Surety Company, as surety, a bond in the sum of $136,252.75 for the faithful performance of said contract, the condition of the bond being "that if the above bounden principal as contractor shall in all respects comply with the terms of the contract and conditions of said contract, and his, their or its obligations thereunder, including the specifications and plans there referred to and made a part thereof, and such alterations as may be made in said specifications and plans as therein provided for, and shall well and truly and in a manner satisfactory to the consulting highway engineer, complete the work contracted for, and shall save harmless the Highway Commission of Forney Creek Road District of Swain County, North Carolina, from any expense incurred through the failure of said contractor, or his, their or its servants, and from any liability for payment of wages or salaries due or material furnished said contractor; and shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them or any of them, for all such labor and materials for which the contractor is liable, . . . then this obligation shall be void; otherwise to be and remain in full force and virtue."

3. After working upon said projects for a little more than a year, the contractor failed, breached its contract, and quit the work long before its completion, and the same was taken over and finished by the Southern Surety Company.

4. The contractor, at the time of its failure, was indebted to a large number of persons and firms for and on account of labor performed and materials furnished and used in and about the construction of said highway.

5. This suit was instituted under C. S., 2445 by laborers and materialmen to recover on the bond given by the contractor. Others intervened and also asserted their claims against said bond.

A reference was had under the statute which resulted in a satisfactory adjustment of most of the claims. But the East Tennessee National Bank appeals from the disallowance of its claim; while the Southern Surety Company appeals from so much of the judgment as relates to the claims of Bryson City Bank, R. L. Tulloh, D. S. Hill and W. J. Savage & Company.

Edwards & Leatherwood for D. S. Hill.

S. W. Black for Bryson City Bank, R. L. Tulloh and W. J. Savage & Company.

Bryson & Bryson and S. W. Black for East Tennessee National Bank.

Robert Ruark for Southern Surety Company.

APPEAL OF INTERVENER, EAST TENNESSEE NATIONAL BANK.

STACY, C. J. In January, 1926, the contractor, R. G. Hill & Company, borrowed from the East Tennessee National Bank the sum of $5,000, executing its promissory note as evidence thereof, a portion of which was used in paying laborers for work done in and about the construction of said highway. The balance of this loan was used for other purposes connected with the construction of said projects.

No assignment was taken from any of the laborers or other persons receiving payment from these funds, and the note itself does not show for what purpose the money was loaned.

The referee held that the loan of $5,000 made by the East Tennessee National Bank to the contractor was not covered by the bond in suit, and this ruling was approved by the judge of the Superior Court. The appeal of the intervener challenges the correctness of the conclusion reached.

The judgment accords with the general holding that a bank furnishing money to a contractor doing public work, for use in paying the claims of laborers and materialmen, without more, does not come within the protection of a statutory bond conditioned to pay all persons supplying the principal with labor or materials in the prosecution of his work. *Bank v. Clark,* 192 N. C., 403, 135 S. E., 123; *Nat. Surety Co. v. Jackson County Bank,* 20 Fed. (2nd), 644.

The terms of the bond in suit, so far as applicable to the claim of the intervener, are no broader than the provisions of the statute; hence the ruling of the Superior Court would seem to be correct. The judgment in this respect is affirmed.

APPEAL OF SOUTHERN SURETY COMPANY.

STACY, C. J. Four separate and distinct propositions are presented by the appeal of the Southern Surety Company. They will be considered *seriatim.*

CLAIM OF BRYSON CITY BANK.

The Bryson City Bank extended to D. S. Hill, foreman of R. G. Hill & Company, credit to the extent of $98.57 with which it is alleged he paid certain persons having claims against the contractor for labor performed in and about the construction of the work, etc., but neither D. S. Hill nor the bank took any assignment or assignments from the persons or employees to whom this money was advanced or paid.

The referee held that the claim of the Bryson City Bank for $98.57 advanced to D. S. Hill, as aforesaid, was not covered by the bond in suit, but this ruling was reversed by the judge of the Superior Court, upon exceptions duly filed to the report of the referee.

It seems to us that the Bryson City Bank is in no better position than the East Tennessee National Bank and that the claim of neither comes within the provisions of the bond or the purview of the statute. The conclusion of the referee in this respect should have been approved.

CLAIM OF R. L. TULLOH.

R. L. Tulloh was employed by the contractor "as a walking-boss or superintendent" in the construction of said highway, and he "performed a class or kind of work necessary to the construction of said highway and road projects." The said contractor is now indebted to Tulloh in the sum of $648.93 for such work done in and about the construction of the highway in question.

It was the conclusion of the referee, approved by the judge of the Superior Court, that the bond in suit, by fair construction, was intended to cover the claim of R. L. Tulloh. The Surety Company excepts to this ruling and relies upon the decision in *Moore v. Industrial Co.,* 138 N. C., 304, 50 S. E., 687, as authority for its position. The claimant, on the other hand, calls attention to the provisions of the bond and cites the case of *Cox v. Lighting Co.,* 152 N. C., 164, 67 S. E., 477, as supporting his position.

In view of the character of work required of the claimant, which does not appear in detail on the record, we are not able to say that there is error in the ruling; hence the judgment in this respect will be upheld. Appellant must show error; it is not presumed. *Jones v. Candler, ante,* 382.

CLAIM OF D. S. HILL.

The claim of D. S. Hill is for $1,044.98, wages as foreman, and $249.94 advanced by him to the "petty cash account" of the contractor and used in making repairs to the machinery from time to time, purchasing materials and paying freight thereon.

The referee concluded that both of these items were covered by the bond in suit, and this was approved by the judge of the Superior Court.

The ruling is correct in so far as it affects the amount due for services as foreman. *Cox v. Lighting Co., supra.* But the $249.94, advanced to the "petty cash account" of the contractor, we apprehend, is no more than a loan of that amount. No assignments were taken for purchases of materials made from said account. In this respect the claimant would seem to stand on a parity with a bank which loaned money to the contractor without taking any assignment of the claims paid. The judgment should be modified accordingly.

CLAIM OF W. J. SAVAGE & COMPANY.

The contractor while at work on the highway in question, borrowed two "sticks" from the Dempster Construction Company for use in repairing its steam shovel, and on 24 April, 1926, it purchased from W. J. Savage & Co. two steam shovel "sticks" at the price of $230, and ordered them shipped to the Dempster Construction Company at Knoxville, Tenn., to replace the "sticks" borrowed. The "sticks" sold by claimant to the contractor were never shipped to the Forney Creek Highway projects and never used by the contractor in the construction of said roads.

The referee concluded that as the transaction simply amounted to "swapping sticks," the claim of W. J. Savage & Company against R. G. Hill & Company was properly covered by the bond in suit, and this was approved by the judge of the Superior Court. The Surety Company assigns such ruling as error.

We think the "sticks" furnished the contractor, for which the Southern Surety Company would be liable under its bonds, were those supplied by the Dempster Construction Company, which have been paid for, not in money, but with other "sticks" purchased from the claimant. W. J. Savage & Company, therefore, is not entitled to enforce collection of its claim against R. G. Hill & Company out of the bond executed by the Southern Surety Company.

Let the cause be remanded with direction that judgment be modified in accordance with this opinion, and as thus modified it will be affirmed.

Modified and affirmed.

W. L. TATE v. PARKER-GRAHAM, SEXTON, INC.

(Filed 9 January, 1929.)

1. **Master and Servant—Master's Liability for Injuries to Servant—Safe Place to Work—Nonsuit.**

   Held, evidence in this case sufficient to be submitted to the jury upon the question of defendant's negligence in not furnishing his employee a reasonably safe place in which to work.

2. **Evidence—Expert Testimony—Conclusions and Opinions—Hypothetical Questions.**

   Martin v. Hanes, 189 N. C., 644, cited and approved as to expert testimony upon hypothethical questions.

3. **Trial—Instructions—Requests for Instructions.**

   A correct charge upon the law arising from the evidence will not be held for error because not more specific, in the absence of special requests.

APPEAL by defendant from *MacRae, Special Judge,* and a jury. From HAYWOOD. No error.

This is an action for actionable negligence brought by plaintiff against the defendant. Plaintiff alleges that his injury was caused by the negligence of the defendant: (a) In failing to warn and instruct the plaintiff of the dangers incident to his employment, and especially of the dangers of going into a dark tunnel without a light, immediately following heavy blasting with large rocks and boulders hanging loose in said tunnel. (b) In failing to have sufficient light in the tunnel. (c) In negligently ordering and requiring plaintiff to stoop and bend over a loaded hole to assist in making a connection with the batteries, etc., without first examining the top and sides thereof, and removing loose rocks, jarred loose by previous blasts. (d) In failing to remove loose rocks before firing another blast and requiring the plaintiff to go immediately under said loose rock in the dark. (e) That the defendant negligently failed to examine the top and sides thereof with a view of removing loose rock and boulders that had been jarred and blasted loose by the previous shooting. It was in evidence that after the firing of the blasts, some 600 to 700 feet under the ground, it was customary, and according to the rules of the company, for the foreman of the defendant company to wait 15 to 20 minutes for the smoke to clear out and the rocks to fall, before ordering the plaintiff and other employees into the tunnel. On the occasion the plaintiff was injured, the foreman was in a hurry, as it was practically time for the day crew to come on duty, and he did not wait longer than four or five minutes before ordering the plaintiff and others into the tunnel. When he gave the order to the plaintiff, the smoke was still in the tunnel, and the loose rocks had not fallen. (f) In failing to use due care to furnish plaintiff a reasonably safe place to work in, and in furnishing a dangerous and unsafe place.

The defendant denied the allegations of negligence and alleged, in effect, that the work was being done in the usual and ordinary manner, and that the stone falling on the plaintiff's head did only a slight and temporary injury, and that it was the result of an accident which could not have been foreseen and avoided."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. What damage, if any, is the plaintiff entitled to recover? Answer: $4,500."

Morgan & Ward for plaintiff.
Rollins & Smathers for defendant.

PER CURIAM. We think the evidence was sufficient to be submitted to the jury. Defendant's motion to nonsuit at the close of plaintiff's evidence and at the close of all the evidence, under C. S., 567, cannot be sustained. The present action is similar to *Buchanan v. Furnace Co.*, 178 N. C., 643, where the law is exhaustively discussed. See *Street v. Coal Co., ante,* 178. The defendant's exception and assignment of error to the hypothetical question propounded to Dr. Abel cannot be sustained.

This Court, in *Martin v. Hanes,* 189 N. C., at p. 646, said: "These cases enunciate the principle that, while a medical expert may not express an opinion as to a controverted fact, he may, upon the assumption that the jury shall find certain facts to be recited in a hypothetical question, express his scientific opinion as to the probable effect of such facts or conditions."

There was no error in the exclusion of evidence offered by defendant. We see no error in the charge, taking the same as a whole. In regard to the charge on damages, the well settled rule in this jurisdiction is that if defendant desired the charge more specific, he must request it by proper prayer for instruction. We find

No error.

M. C. SALASSA v. WESTERN CAROLINA TITLE AND MORTGAGE COMPANY AND C. L. MAXWELL.

(Filed 9 January, 1929.)

Chattel Mortgages—Registration and Indexing—Lien and Priority—Attachment.

The claim of an attaching creditor is superior to a lien under a prior unregistered chattel mortgage.

APPEAL by intervener, Freas Brothers, Inc., from *McElroy, J.*, at August Term, 1928, of BUNCOMBE. Affirmed.

Harkins & Van Winkle for plaintiff.
J. E. Baumberger and F. W. Thomas for intervener.

PER CURIAM. It appears upon the agreed statement of facts that the defendant Maxwell bought a Dodge car from the intervener on November 30, 1925, in the State of Pennsylvania, and to secure the unpaid part of the purchase price executed a conditional sales contract which was never recorded in Pennsylvania or in North Carolina. Maxwell afterwards moved to North Carolina and became indebted to the plaintiff on a promissory note. The plaintiff brought suit on the note and attached the car in Buncombe County. The only question is whether the plaintiff's claim has precedence over that of the intervener. The trial judge held that upon the agreed facts the plaintiff's claim has priority. In our opinion this conclusion is free from error, and the judgment is

Affirmed.

JOE P. DUNLOP v. J. M. SMITH, P. V. RECTOR, MARGARET BECK AND E. G. HESTER.

(Filed 9 January, 1929.)

1. **Contracts—Requisites and Validity—Acceptance—Burden of Proof.**

Where the defense to an action to recover the balance alleged to be due on a note after foreclosure of the mortgage securing it, is that the payee agreed to bid the lands in for the full amount of the note, and the evidence discloses an offer to do so without acceptance of such offer, the plaintiff is entitled to recover, and the burden of proving the defense is on the defendant.

2. **Trial—Reception of Evidence—Objections, Motions to Strike Out, and Exceptions.**

It is not error for the court upon the trial to strike out direct evidence and exclude evidence in corroboration of such direct evidence when such evidence is insufficient to sustain the allegations of the answer of the objecting defendant.

APPEAL by defendants from *Moore, J.*, at June Term, 1928, of BUNCOMBE. No error.

Action to recover the balance due on certain notes executed by defendants, J. M. Smith, P. V. Rector and Margaret Beck, payable to the order of defendant, E. G. Hester, and assigned by the endorsement of the payee to the plaintiff, who is now the holder thereof.

In defense of plaintiff's recovery in this action, defendants allege that plaintiff agreed to take the land conveyed by the deed of trust to secure said notes, in satisfaction of same, and in discharge of the defendants from personal liability as makers and endorsers of said notes.

The deed of trust has been foreclosed; plaintiff was the purchaser of the land at the sale by the trustee, at a sum less than the amount due on said notes. This action is to recover the deficiency.

From judgment for plaintiff, in accordance with the verdict, defendants appealed to the Supreme Court.

Lee, Ford & Coxe for plaintiff.

Galloway & Galloway and Weaver & Patla for defendants.

PER CURIAM. The evidence offered by defendants, in support of the allegations in their answer, upon which they rely as a defense to plaintiff's recovery in this action, tends to show only a purpose on the part of plaintiff to bid the amount of his notes for the land conveyed by the deed of trust, in the event there was a sale of said land by the trustee to foreclose the deed of trust. If it should be held that this evidence was sufficient to show an offer by plaintiff to take the land in satisfaction of the amount due on the notes, and in discharge of defendants from personal liability as makers and endorsers, then it must further be held that there was no evidence tending to show an acceptance of said offer by defendants, or either of them. It cannot be held that plaintiff was estopped by his expression of a purpose, prior to the sale, to bid the amount due on his notes in the event that there was a sale, from maintaining this action. Defendants, or at least some of them, were present at the sale and bid on the land.

The ruling of the court, striking out the testimony of defendant, Smith, and excluding testimony offered in corroboration of Smith's testimony as to what the plaintiff had said to him, were in effect a holding that the testimony was not sufficient as evidence to sustain the allegations of the answer. In this there was no error.

Defendants admitted their liability, as makers and endorsers on the notes. The burden was upon them to offer evidence in support of their defense. They failed to do this. There is no error in the instruction of the court to the jury, which is assigned as error upon defendants' appeal to this Court. The judgment is affirmed. There is

No error.

CAROLINA MOUNTAINS REALTY CORPORATION v. RALPH R. FISHER ET AL.

(Filed 9 January, 1929.)

Appeal and Error—Record—Matters Not Set Out in Record Deemed Without Error.

Exceptions to evidence taken before a referee, considered by the trial judge in ruling on the exceptions, will not be considered on appeal when such evidence does not appear in the record.

APPEAL by defendant from *Shenck, J.*, at July-August Term, 1928, of TRANSYLVANIA.

Civil action to recover the amount advanced under a contract between the parties, whereby the plaintiffs agreed to purchase, and the defendant agreed to convey, not later than 15 May, 1926, a marketable, unencumbered title to a large area of land situate in Transylvania County, the plaintiffs alleging that the defendant had failed to secure and was yet unable to convey an unencumbered title to the lands in question—the liens and encumbrances thereon exceeding in amount the balance of the purchase price—and that, under the express provisions of the contract, the plaintiffs were entitled to a refund of the one-fourth cash payment advanced.

The defendant, answering, prayed for specific performance and contended at the time of trial that the title had then been perfected.

A reference was ordered under the statute, and the matter heard by Hon. T. J. Johnston, who found the facts and reported the same, together with his conclusions of law, to the court. Upon exceptions duly filed to the report of the referee, the same was modified and affirmed, and judgment entered denying specific performance to the defendant and awarding the plaintiffs recovery in the sum of $13,279.71, with interest from 15 December, 1926. Defendant appeals, assigning errors.

W. E. Breese, Merrimon, Adams & Adams and D. L. English for plaintiff.

Chas. E. Jones, George H. Smathers and Lewis P. Hamlin for defendant.

PER CURIAM. This case was the subject of earnest debate on the hearing, but a careful examination of the record fails to disclose any exceptive assignment of error of sufficient merit to warrant a reversal or disturbance of the judgment.

The evidence taken before the referee, and considered by the judge in ruling upon the exceptions, is not incorporated in the case on appeal, and we cannot say that there is error in the judgment. None appears on the face of the record.

Affirmed.

JULIAN A. GLAZENER v. THE SAFETY TRANSIT LINES, INC., AND T. C. HENDERSON.

(Filed 9 January, 1929.)

Parties — Defendant — Joinder — Joint Tort-Feasors — Automobiles — Demurrer.

Where the plaintiff alleges that he was riding in an automobile independently driven by another, and that he received injuries proximately caused by the concurrent negligence of such driver, and the driver of another automobile, alleging in detail sufficient matters to constitute negligence on the part of both drivers, the negligence alleged is of a joint tort, permitting recovery against each or both joint *tort-feasors*, and a demurrer to the complaint for misjoinder of parties and causes of action is bad.

APPEAL by defendant, The Safety Transit Lines, Inc., from *Schenck, J.*, at August Term, 1928, of TRANSYLVANIA. Affirmed.

Action to recover damages for personal injuries caused by the joint and concurrent negligence of defendants.

From judgment overruling its demurrer to the complaint, defendant, The Safety Transit Lines, Inc., appealed to the Supreme Court.

No counsel for plaintiff.
D. L. English for defendant.

PER CURIAM. There is no error in the judgment overruling appellant's demurrer to the complaint, upon the ground, first, that the facts stated therein are not sufficient to constitute a cause of action; and, second, that there is a misjoinder therein both of parties and causes of action.

The facts alleged in the complaint, taken to be true for the purposes of this appeal, are sufficient to constitute a cause of action against both defendants. Plaintiff, while riding as a guest in an automobile driven by defendant, T. C. Henderson, was injured as the result of a collision between said automobile and a bus owned and operated by defendant, The Safety Transit Lines, Inc., on a State Highway. Upon the facts alleged in the complaint, the proximate cause of plaintiff's injuries was the joint and concurrent negligence of the defendants. Upon these facts they are liable as joint *tort-feasors*. *Lineberger v. City of Gastonia, ante,* 445; *Moses v. Morganton,* 192 N. C., 102, 133 S. E., 421.

In *Ballinger v. Thomas et al.,* 195 N. C., 517, 142 S. E., 761, it is said: "That one who is riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence, is fully established by our own decisions, and the great weight of authority elsewhere." See cases cited.

There are no inconsistent allegations with respect to the negligence of the defendants in this case, as there were in *Ballinger v. Thomas.* Nor is the allegation that the joint and concurrent negligence of defendants was the proximate cause of plaintiff's injuries, merely a conclusion of law by the pleader. The facts with respect to the negligence of both defendants are alleged in the complaint, specifically and in detail. Upon these facts plaintiff is entitled to recover of either or both of the defendants.

The action is remanded to the Superior Court of Transylvania County, to the end that defendants may file answers to the complaint, if they are so advised. The judgment is

Affirmed.

R. B. LINEBERGER v. RUBY COTTON MILLS, INC.

(Filed 16 January, 1929.)

1. **Injunction—Grounds of Relief—Irreparable Loss—Equity.**
   It is the province of equity to prevent by injunctive relief a continuance of unlawful conditions that work irreparable loss to the plaintiff in the suit.
2. **Appeal and Error—Review—Burden of Showing Error—Injunction.**
   The appellant from the denial of the Superior Court judge to grant injunctive relief must show error of the lower court, and where the judgment of the lower court does not show upon what state of facts the relief in equity was denied, and they are not otherwise made to appear, the judgment below will be affirmed in the Supreme Court, especially if it is made to appear that the plaintiff is a party in another and independent action wherein he could set up the same relief as sought in the present action.

APPEAL by plaintiff from *Harding, J.*, at August Term, 1928, of GASTON. Affirmed.

This was an action for actionable negligence brought by plaintiff against defendant, a textile manufacturing plant. Plaintiff alleges that defendant is emptying its sewer, which flows into Little Catawba Creek above plaintiff's land, causing damage. This is denied by defendant. Plaintiff prays injunctive relief.

At the hearing the court below rendered the following judgment: "This cause coming on to be heard upon the motion of the plaintiff for a restraining order, and being heard upon the complaint and affidavits for plaintiffs, and the answer and affidavits for the defendant, and the argument of counsel for both plaintiff and defendant: It is considered, ordered, adjudged and decreed that the motion for the restraining order be, and the same is denied."

B. Capps and J. L. Hamme for plaintiff.

Cansler & Cansler, Mason & Mason and A. C. Jones for defendant.

CLARKSON, J. "Injunction has been styled the 'strong arm' of equity to be used only to prevent irreparable injury," etc. See *Hurwitz v. Sand Co.,* 189 N. C., at p. 4.

It is contended by defendant: "It may be that appellant (plaintiff) suffers as complained of, which is denied, but the appellee denies that it has caused or contributed to the inconvenience or injury of appellant. If the appellant has suffered the injury alleged, it is contended that the overwhelming proof is that the cause for same is not to be attributed to any act of the appellee or its septic tank, but to other and independent causes not connected with appellee or for which it is in any way responsible. It is to be noted that appellant alleges that other disposal plants contribute to the alleged conditions on his lands, and the contention of appellee is that these independent causes are the sole cause of the alleged injury and nuisance, if any exists."

The law, as stated in *Wentz v. Land Co.,* 193 N. C., at p. 34, is as follows: "In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Leaksville Woolen Mills v. Spray Water Power and Land Co.,* 183 N. C., 511; *Cameron v. Highway Commission,* 188 N. C., 84.

In the present case the court below upon the hearing found no facts, but denied the restraining order.

In *Finger v. Spinning Co.,* 190 N. C., p. 74, the court below found the facts and enjoined the defendants, and quoted from *Rhyne v. Mfg. Co.,* 182 N. C., at p. 493, as follows: "The defendant must attain its ends, advance its interests, or serve its convenience, by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others—'*Sic utere tuo, ut alienum non laedas.*'" We adhere to the principles so well stated in the opinions in the above cases.

The plaintiff seeks the extraordinary power of injunctive relief. The court below denied the restraining order. The burden is on appellant to show error. The presumption is that the judgment in the court below is correct. The defendant in this action is also defendant in the action in *Lineberger v. City of Gastonia, Winget Yarn Mills Company, Ruby Cotton Mills, Inc., and Dixon Mills, Inc., ante,* 445, for the same alleged wrong that injunctive relief is sought in this action. The decision in that action, under the allegations of the complaint, hold that all the defendants are *tort-feasors* and the demurrers are overruled and all the defendants are properly joined. The record, as now presented to this Court, shows the present action against the defendant, Ruby Cotton

Mills, Inc., that the subject-matter is identically the same as the cause in which it is joined with the City of Gastonia and others, *supra.* It may be that other facts will develop in that action not now before us. On the peculiar state of the record concerning both actions, we do not feel that the equitable power of this Court should be brought into play to find the facts or overrule the judgment of the court below, which is presumed to be correct. The judgment is

Affirmed.

W. D. COLWELL AND WIFE, KIZZIE COLWELL, v. MARTIN O'BRIEN AND WIFE, MARY C. O'BRIEN.

(Filed 16 January, 1929.)

1. **Specific Performance—Contracts Enforceable—Contract Without Privy Examination of Wife.**

   Where the husband and wife enter into a contract with another for the exchange of lands by mutual conveyance, and the privy examination of the wife is not taken to the contract to convey, the husband having only an inchoate right of curtesy in his wife's lands, the remedy of the other party to the contract is to tender his deed and receive a deed from the husband for his interest therein, and hold both the husband and wife for damages for any deficiency in the title if the wife will not then properly join in his deed.

2. **Same—Damages.**

   Where the husband and wife have contracted to convey the wife's land in exchange for other lands, and her privy examination has not been taken to the contract, equity will not deny granting a decree of specific performance against the husband, giving the plaintiff a right to hold them both in damages for any deficiency in title.

APPEAL by plaintiffs from *Sinclair, J.*, at February Term, 1928, of NEW HANOVER.

Civil action to enforce specific performance and to recover damages for breach of the following contract:

"This agreement entered into the 18th day of March, 1927, by and between W. D. Colwell and wife, Kizzie Colwell, parties of the first part, and Martin O'Brien and wife, Mary O'Brien, parties of the second part:

"Witnesseth, That for and in consideration of the sum of one dollar to each of them in hand paid, the receipt of which is hereby acknowledged, the parties of the first part agree to make a full and warranty deed to the parties of the second part for fifty-nine lots, said being all the vacant lots owned in Pinehurst subdivision by the parties of the first part, and one six-room house known as 701 Colwell Avenue, subject to a fifteen hundred dollar mortgage now on this house. It is further agreed to make a ten-foot alley in blocks B, D and E, in the said Pinehurst subdivision.

"The parties of the second part agree to make a full warranty deed to the parties of the first part of the property located on the northeast corner of Front and Castle streets, and known as the Harper Sanitarium, and being the property bought from the estate of Charlie Harper. Both of the properties are to be free from any and all encumbrances, and this is to be an even trade, no money to be passed by either party.

"It is further agreed and made a part of this contract that there are to be as many as ten of these lots in Pinehurst sold by 1 April, 1927, or at the time that the transfers of the respective properties are made, not to exceed the aforesaid date of 1 April, 1927. All moneys derived from the sale of any of the fifty-nine lots in the Pinehurst subdivision is to be the property of Martin O'Brien. On all lots sold at Pinehurst, including the ten above mentioned, the parties of the second part agree to pay to the Northrop Real Estate Agency a commission of thirty-five dollars for each and every lot sold by them.

"(Signed) MARTIN O'BRIEN.
MARY C. O'BRIEN.
W. D. COLWELL.
KIZZIE COLWELL.

"Witness: R. H. NORTHROP."

The ten lots mentioned in the last paragraph of said contract were sold before 1 April, 1927 (R., p. 21), and plaintiffs tender deed for their property in accordance with the terms of the contract.

The cause of action for specific performance was nonsuited because it appeared that title to "the property located on the northeast corner of Front and Castle streets, and known as the Harper Sanitarium" was in Mary C. O'Brien, whose privy examination had not been taken at the time of the execution of said contract or at any other time, and that Martin O'Brien had only an inchoate right of curtesy in said property.

On the cause of action for damages there was a verdict and judgment for 50 cents, from which plaintiffs appeal, assigning errors.

Bellamy & Bellamy, John A. Stevens and Isaac C. Wright for plaintiffs.

Bryan & Campbell for defendants.

STACY, C. J., after stating the case: Conceding that specific performance may not be had against Mrs. Mary C. O'Brien, we see no reason why Martin O'Brien should not be required to convey his interest in the property mentioned in the contract, upon receipt of deed from plaintiffs conveying their property, and be held in damages along with his wife for the deficiency in the title, if Mrs. O'Brien will not join in the deed. *Bethell v. McKinney,* 164 N. C., 71, 80 S. E., 162; *Braddy v. Elliott,* 146 N. C., 578, 60 S. E., 507; *Warren v. Dail,* 170 N. C., 406, 87 S. E., 126.

The judgment of nonsuit will be reversed, a new trial awarded and the cause remanded for further proceedings, not inconsistent herewith, according to the usual course and practice of the court, and as the rights of the parties may require.

Reversed.

J. D. LUNSFORD v. ASHEVILLE MANUFACTURING COMPANY.

(Filed 16 January, 1929.)

Master and Servant—Liability of Master for Injuries to Servant—Contributory Negligence of Servant.

While in the course of his employment the plaintiff was engaged in running a truck loaded with several tons of lumber, running on wheels upon a track from his employer's dry kiln to a transfer point, and knowing that the truck would run down on an incline, chose of his own volition, without instructions to do so, to try to stop the moving truck by getting in front of it and bracing his back against it, in an unusual manner, and thus received the injury in suit: *Held,* the conduct of the plaintiff constituted contributory negligence that would bar his recovery, if his negligence was the cause or one of the causes without which the injury would not have occurred.

CIVIL ACTION, before *Moore, J.,* at May Term, 1928, of BUNCOMBE.

The evidence tended to show that plaintiff, at the time of his injury, was taking a truck out of the kiln to the transfer. The trucks ran on tracks and were five feet long and four or five feet wide, and ran on wheels about six or seven inches high. The truck that injured the plaintiff was loaded with several tons of lumber. The trucks were pushed along the track to the "transfer," which ran on a track on the outside of the dry-kiln room.

The plaintiff testified that the transfer track and the kiln track did not match by reason of the fact that there was about a two-inch fall from the kiln track to the transfer track. Plaintiff testified as follows: "The track that ran through the kiln room was just up and down. Sometimes it ran away with you and you couldn't hold it, and sometimes you had to push it. . . . You cannot follow the truck out and hold to it. You have to hold to it until you get to the door and then hold to the back sticks or get a man in front. There has to be a man in front holding to it to keep it from running off the transfer. On 6 May, the day I was hurt, the truck ran out there and I undertook to hold it and had to jump on the outside to catch it, and it came with such speed it hit me in the back, then it run on with me to a scotch I had on the transfer, hit the scotch and came back and bounced back and hit me again in the back and hurt me bad. . . . When I jumped in front to hold it to keep it from going in the mill against the rip saw is when it hit me. . . . The way I got ahead of it, it was coming, and I ran to keep from mashing in the door. You cannot get beside it when it is in the door. I had to get out while I could and get hold of it in some other way when it came on the transfer. When I grabbed I threw my back against it to hold it back. . . . When I went out to try and stop the truck as I went to the platform I was in front. I had my back to it. I couldn't hold any other way."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $2,500.

From judgment upon the verdict defendant appealed.

George M. Pritchard for plaintiff.
Weaver & Patla for defendant.

BROGDEN, J. The evidence discloses that the plaintiff stepped in front of a heavily loaded moving truck of lumber and attempted to hold it by placing his back against it, and, as a result thereof, received the injury complained of. There is no evidence that he was directed to move the truck or to stop the truck in any such manner, or that such method of stopping the truck was in use about the plant. Therefore, as we interpret the record, the plaintiff deliberately and voluntarily chose a highly dangerous method of stopping the truck.

"When contributory negligence appears from the plaintiff's evidence, a nonsuit is properly granted, but not when such evidence is from the defendant." *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87. And when a person *sui juris* knows of a dangerous condition and voluntarily goes into a place of danger, he is guilty of contributory negligence which will bar recovery. *Royster v. R. R.,* 147 N. C., 347, 61 S. E., 179; *Fulghum v. R. R.,* 158 N. C., 555, 74 S. E., 584.

There was evidence on behalf of plaintiff tending to show that the walkway was in a defective condition, but the plaintiff's negligence, in order to bar recovery, need not be the sole proximate cause of the injury, for this would exclude the idea of negligence on the part of defendant. It is sufficient if his negligence is a cause, or one of the causes without which the injury would not have occurred. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672; *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9; *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298.

Certainly the injury to plaintiff could not have occurred had he not voluntarily placed himself upon the track in front of a moving truck, pressing his back against it in an attempt to hold it. Under the well established principles of law pertinent to such a state of facts, the plaintiff is not entitled to recover, and the motion for nonsuit duly made should have been granted.

Reversed.

FRANK WEEKS v. B. M. ADAMS.

(Filed 16 January, 1929.)

1. **Sales—Conditional Sales—Registration and Priority—Attachment.**

   A title retaining contract in the sale of personalty is in the nature of a chattel mortgage, and when registered prior to an attachment of the property it is superior to the claim of the attaching creditor.

2. **Same—Rights of Parties.**

   Where the purchaser under a title retaining contract of sale of a chattel has falsely entered into the contract under an assumed name, and the contract is registered prior to a levy of attachment on the property: *Held*, the vendor's lien under the prior registered conditional sales contract is good as against the creditor's levy in attachment, as the title remains in the vendor unaffected by the subsequent attachment.

3. **Appeal and Error—Harmless Error—Instructions.**

   Where the verdict of the jury is in accordance with the admissions made by the parties at the trial, an incorrect instruction in other respects will not constitute reversible error.

APPEAL by plaintiff from *Moore, J.*, at July Term, 1928, of SWAIN. No error.

Edwards & Leatherwood, W. G. Hall and Moody & Moody for plaintiff.

Shuford & Hartshorn and S. W. Black for Sterchi Brothers.

ADAMS, J. There is evidence tending to show that on 3 January, 1927, B. M. Adams, the defendant, representing himself to be William Calhoun, of Bryson City, Swain County, purchased on credit from Sterchi Brothers of Asheville various articles of furniture at the agreed price of $2,314, and procured the furniture to be shipped to Bryson

City in Calhoun's name. The furniture was delivered to Adams and used by him in a house in Bryson City which he had rented from the plaintiff. Calhoun testified that he had not authorized Adams to purchase the furniture in his name, and had not authorized any one to deliver it to Adams; but there is some evidence to the contrary.

Adams became indebted to the plaintiff in the sum of $800 for rent, coal, and wood. The plaintiff brought suit for this amount, and on 2 February, 1927, caused a warrant of attachment to be levied on the property in question. Thereafter Sterchi Brothers intervened, claiming to have retained title to the property at the time of the sale. The controversy therefore is reduced to the single question whether Sterchi Brothers have priority over the plaintiff's attachment. On this point we find in the record an express agreement of counsel that at the time B. M. Adams purchased the furniture from Sterchi Brothers he signed and executed in the name of William Calhoun a conditional sales contract to Sterchi Brothers securing the purchase price, and that the contract was duly registered in the office of the register of deeds of Swain County before the plaintiff's warrant of attachment was levied on the furniture.

All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, etc. C. S., 3312. The purchaser resided in Swain County, and there the conditional sale was properly registered. *Barrington v. Skinner,* 117 N. C., 48. The relation between the purchaser and seller is that of mortgagor and mortgagee. *Mfg. Co. v. Gray,* 121 N. C., 170. As the title was retained until the purchase money was paid, the title to the furniture was not transferred either to Adams or to Calhoun. *Frick v. Hilliard,* 95 N. C., 117; *Harris v. Woodard,* 96 N. C., 232.

In these circumstances it is unnecessary to enter into a discussion of the distinction between fraud in the *factum* and fraud in the treaty or to determine whether the alleged sale was void or voidable. *Glass Co. v. Fidelity Co.,* 193 N. C., 769; *Parker v. Thomas,* 192 N. C., 798; *Furst v. Merritt,* 190 N. C., 397. The admission of the plaintiff gives to Sterchi Brothers priority of claim for the purpose of foreclosing the conditional sale. For this reason if there is error in the instructions given the jury, as contended by the appellant, the verdict of the jury is in accord with the express admission of the parties and the appellant is not entitled to a new trial. There was no reversible error in the admission of evidence, or in the order amending the interplea, or in declining the plaintiff's motion for nonsuit.

No error.

C. A. GEORGE v. JOHN H. SMATHERS AND JOSEPHINE SMATHERS.

(Filed 16 January, 1929.)

Pleadings—Demurrer—Effect of Demurrer.

Where the defendant demurs to the sufficiency of the allegations of the complaint, and sets up a counterclaim by way of answer to which the plaintiff demurs, and both demurrers are sustained: *Held*, the matters alleged both in the complaint and answer are admitted, and under the facts of this appeal the rights of the parties can be more satisfactorily determined after a full disclosure of all the facts and circumstances, and the action of the trial judge in sustaining the demurrers is reversed on appeal.

APPEAL by plaintiff and defendants from *MacRae, Special Judge,* at October Special Term, 1928, of HAYWOOD. Reversed.

Alley & Alley for plaintiff.
Joseph E. Johnson for defendants.

ADAMS, J. The controversy involves the alleged rights of the parties growing out of the construction and use of a party wall. The plaintiff brought suit to recover the sum of $513.92 as one-half the actual cost of the construction of the wall in question, and the defendants, denying certain material allegations of the complaint, pleaded a counterclaim to the plaintiff's cause of action, the circumstances in reference to which are fully set forth in the further answer of the defendants. They pray that the plaintiff's action be dismissed and that they recover of the plaintiff the sum of $1,500. The plaintiff filed a reply to the further answer and counterclaim; and after the jury had been empaneled and the pleadings had been read, the defendants demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action in that it seeks contribution from the defendants for one-half the cost of building an additional story to an existing party wall, resting one-half on the plaintiff's land and one-half on the defendants' land. The plaintiff demurred *ore tenus* to the further answer and counterclaim for that sufficient facts are not therein stated to constitute a cause of action. Both demurrers were sustained and the complaint and the counterclaim were dismissed and the costs were taxed against the plaintiff.

As each demurrer admits of the allegations of the adverse pleadings, we are of opinion that the rights of the parties can be more satisfactorily determined after a full disclosure of all the facts and circumstances which are made the basis of the plaintiff's complaint and of the defendants' further answer and counterclaim. The judgment sustaining each demurrer is therefore reversed to the end that the facts may be developed and the disputed allegations determined.

Reversed.

SAMPSON B. BAILEY v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 16 January, 1929.)

1. **Railroads—Negligence—Injuries to Persons On or Near Track—Contributory Negligence.**

   Where in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff by being struck by defendant's train while he was negligently attempting to cross the tracks without looking for the approach of trains, the doctrine of contributory negligence is applied in bar of the plaintiff's recovering damages.

2. **Negligence—Contributory Negligence—Proximate Cause.**

   The contributory negligence of the plaintiff will bar his recovering damages arising from the negligence of the defendant when the plaintiff's negligence concurs and coöperates therewith and becomes the real, efficient and proximate cause of the injury in suit, or that cause without which the injury would not have occurred.

CIVIL ACTION, before *McElroy, J.*, at March Term, 1928, of YANCEY.

At the conclusion of the evidence for plaintiff the motion of nonsuit made by the defendant was sustained, and the plaintiff appealed.

G. D. Bailey and C. R. Hamrick for plaintiff.

J. J. McLaughlin, Charles Hutchins and Pless & Pless for defendant.

PER CURIAM. The plaintiff, who was 73 years of age, and deaf, attempted to cross the track of defendant at a public crossing near Micaville.

In describing the manner of his injury, plaintiff said: "I never paid much attention, but I looked up the road, and I went to step up on the road and didn't know anything then. . . . When I was within five feet of the cross-ties I could see down the track . . . .about 200 feet. . . . I wasn't paying much attention, and I expect I couldn't hear that noise made by the engine pushing those cars around that curve, up grade. I reckon I didn't look that time when I got within five feet of the cross-ties." There was evidence that the train gave no signal as it approached the crossing.

Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which concurring and coöperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776; *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Pope v. R. R.,* 195 N. C., 67, 141 S. E., 350.

The facts disclosed by the present record bring the case squarely within the principles announced by this Court in the *Elder* and *Pope cases, supra,* and the ruling of the trial judge in sustaining the motion of nonsuit is approved.

Affirmed.

MAGGIE GIBBS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 16 January, 1929.)

1. **Trial—Taking Case or Question From Jury—Motion of Nonsuit—Waiver.**

The defendant in a civil action for damages waives his right to maintain the insufficiency of the evidence to take the case to the jury by not making a motion as of nonsuit thereon at the close of the evidence. C. S., 567.

2. **Negligence—Proximate Cause—Definition of Proximate Cause.**

Negligence to be actionable must be the proximate cause of the injury in suit, or that cause which, in natural and continuous sequence, unbroken by any new or independent cause, produces the event, and without which it would not have occurred.

3. **Telegraph Companies—Telegrams—Liability for Negligence in Transmitting—Damages.**

A telegram received for transmission by a telegraph company reading, "Come at once, Lawrence is seriously shot and cannot live," is a death message, and in itself gives notice to the company that from its negligent failure to deliver it damages would likely be caused the sendee.

4. **Same—Mental Anguish—Relationship.**

Where a telegraph company receives a telegram for transmission and delivery, relating to sickness and death, so worded as to apprise it that damages would likely result to the addressee upon its negligent failure to deliver it, it is unnecessary for the company to have been notified of the relationship of the addressee as mother of the person named in the message in order for her to recover damages for her mental anguish proximately caused by the company's negligent delay, and she is not required to prove that such mental anguish was in fact suffered by her, as this will be presumed from the relationship of mother and son.

5. Same—Damages—Questions for Jury.

In an action by the mother, the addressee of a telegram informing her of the fatal shooting of her son and telling her to come, where there is evidence tending to show that she received the information first through the item of a newspaper too late to reach his bedside before his death, the jury may award such damages as they may find she had suffered as the proximate cause of the defendant's negligence in the delay of the delivery of the message sued on.

6. Same—Duty to Minimize Damages.

Where a telegram to a mother informing her of the fatal shooting of her son is delayed on its delivery, and there is evidence that she first received the information from another source in time to have reached his bedside before his death, and also evidence to the contrary: *Held,* under the doctrine requiring her to do what she reasonably could to minimize her damages, the question of whether she made every reasonable effort to reach the bedside of her son before his death is for the jury.

BROGDEN, J., dissenting.

APPEAL by defendant from *Deal, J.,* and a jury, at May Term, 1928, of HAYWOOD. No error.

This was an action for actionable negligence, brought by plaintiff against defendant for not delivering a death message.

The plaintiff alleges: "That the plaintiff is the mother of several children, and that on and prior to the grievance hereinafter mentioned her son, Lawrence Gibbs, had resided in the city of Asheville, N. C., for some time; and that on Monday morning, 27 December, 1926, about the hour of two o'clock a.m., the plaintiff's said son, Lawrence Gibbs, was mortally wounded, having been shot with a pistol just below his heart; and that thereafter at 7:33 a.m., on the same date, and as soon as the defendant company opened its Asheville office so maintained by it for the purpose of receiving and transmitting messages, the plaintiff's daughter-in-law, Mattie Gibbs, filed with the defendant company, and paid the usual and customary charges demanded by the company therefor, a message and telegram to the plaintiff in words and figures as follows, to wit:

'Asheville, N. C., 7:33 A.M.,
Dec. 27, 1926.

Maggie Gibbs,
Waynesville, N. Car.

Come at once Lawrence is seriously shot and cant live.

MATTIE GIBBS.
801A.'

"That the said message was transmitted from the Asheville office by the defendant company to the Waynesville office of the defendant company, and received by the Waynesville office at one minute after eight o'clock on the said 27 December, 1926."

In answer the defendant says: "That defendant has no knowledge or information sufficient to form a belief as to the allegations contained in said complaint, except so much thereof as alleges that there was filed in its office in the city of Asheville, N. C., to be transmitted to the plaintiff, at Waynesville, N. C., a telegraphic message in words and figures substantially the same as that set out in said paragraph."

Mattie Gibbs testified, in part: "I live at 63 Clingman Avenue, Asheville, and am the wife of Lawrence Gibbs. I know Maggie Gibbs. She is the mother of Lawrence Gibbs, and on 27 December, 1926, lived in Waynesville, N. C. I do not know how long she has been living in Waynesville—practically all of her life, I suppose. On 27 December, 1926, she was living in Waynesville, over in the colored town, not very far from Main Street—I suppose about a quarter of a mile from Main Street—and I should think in sight of Main Street. . . . Lawrence Gibbs got shot. It was about 2:30 or 3 o'clock in the morning of 27 December, 1926. I sent a telegram to the mother of Lawrence Gibbs between 7 and 8 o'clock. I couldn't tell the exact hour. I did not go to the office of the company to send the telegram. I sent it over my telephone. The message, which you show me, is the message that I sent. The Western Union did not deliver to me that day any message to the effect that the message I sent had not been delivered to Maggie Gibbs. The first information I had that Maggie Gibbs had not received the message was on the morning of 28 December, 1926. I got that information from Samuel Gibbs, the son of Maggie Gibbs, who called me on the telephone. Maggie Gibbs came to Asheville on 28 December, 1926, about five or six hours after Lawrence had died. He died at five minutes past six o'clock on the morning of the 28th, and his mother came on the one o'clock train. I could not say when it gets to Asheville. The passenger train left Waynesville for Asheville about 11 o'clock, because it gets to Asheville about 1 or 1:30. I know it was 1 o'clock or after when she got to my house. That was the first passenger train leaving Waynesville going towards Asheville that day. The next one left at 5 o'clock that afternoon. Maggie Gibbs' son died before Maggie Gibbs arrived at my house."

Q. "What was the condition of Lawrence from the time he was shot up to the time he died with reference to whether he was conscious or unconscious?" A. "He was conscious. . . . My mother-in-law had no telephone in her house. The distance from Waynesville to Asheville was thirty-two miles."

Q. "Did he know people all the time?" A. "Yes, sir, he did."

Maggie Gibbs testified in part: "I am the mother of Lawrence Gibbs. On 27 December, 1926, I lived right where I live now, and have been living for ten years. I live within a quarter of a mile from here, in sight of Main Street. I do not know how far from Main Street, but not far. It might be 300 yards. I know where the Western Union Telegraph office was then. It was on that street going down to Charley Ray's store, just off of Main Street. It is right near the postoffice. I was at home all day 27 December, 1926. I was there that night till late in the evening I come to town. The Western Union Telegraph Company did not deliver to me any message of my son, Lawrence, having been shot. I first learned that he was shot after the train had run and my cousin asked me if I knew Lawrence was shot, and he said it was in the evening paper. It was after sundown."

Q. "What was the condition of the weather?" A. "Against I got home it had commenced raining, and it rained all night."

The plaintiff was then asked the following question:

Q. "Did you make any effort that night to go to Asheville to the bedside of your son?" A. "My son looked for us, and I first looked to see if she had wrote or sent us a telegram, and by that time it was after night."

Q. "State whether or not you made any effort to get an automobile at that hour to go to Asheville?" A. "My sister said she would let us have her automobile, but she couldn't drive it, and I couldn't. I went to Asheville to see my son on the first train the next day. I think it was due to leave Waynesville about 11 o'clock, but it was after that when we left. I did not have any other way of getting to Asheville, except on the train. When I got there my son had been dead four or five hours. I knew he was dead prior to the time I left here. I learned it that morning about 6 o'clock, I think. I had just got up. If the telegram introduced in evidence had been delivered to me any time on 27 December, prior to the running of the evening train, I could have left on the 11 o'clock train, or the evening train either one."

Q. "Would you have left on one of these trains?" A. "Yes, sir. I never felt right about not getting to the bedside of my son before he died, because I think I ought to have seen my child, and I could have seen him if I had gotten the telegram."

Q. "How did it affect you?" A. "I just can't stand to talk about it. Lawrence had lived in Asheville about ten years or more. Prior to that time he lived here in Waynesville."

Q. "After he moved from Waynesville to Asheville, state whether or not you were in the habit of from time to time going to see him and whether or not he would visit you; and if so, how often?" A. "He would come home to see me often. (Cross-examination): I first heard that this message had been sent after the train passed here that night, 26 or 27 December, I reckon it was. I learned it out of the paper. I did not learn that the telegram had been sent until the night of the 27th. My son had to hunt it up. It was delivered to my son. It was never delivered to me. I found out about my son in Asheville being shot, after the evening train run. I don't know just when it was, but it was between sundown and dark. The train runs very late, and I come to town and found it out from the paper. I did not telephone to Asheville that night about it. My son telephoned. I wasn't with him. Next morning about 6 o'clock I found out my son was dead. Mattie phoned over to the preacher and he brought me word. My son was buried in Waynesville. I was at his funeral and came over with funeral procession from Asheville. From the time I heard on the afternoon of the 27th that my son had been seriously shot, I did not communicate with Asheville at all, but I had my son to. I wasn't able. After I got the information out of the paper. I didn't make any effort to get away to go to Asheville that night. My son did. A woman like me don't get out in the night. I did not myself make any effort to get a way to go to Asheville that night. I had no way to go to Asheville, and made no effort to go."

Q. "You had no way, and you made no effort to go? You didn't try to go on the bus, did you?" A. "Colored folks don't ride on the bus; they are not allowed to."

(By the court): "Gentlemen, you will not consider the answer, that colored folks are not allowed to ride on the bus."

"I am 56 years old. Lawrence was 39 when he died. He was my oldest son."

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant negligently fail to transmit and deliver the message, as alleged in the complaint? A. Yes.

"2. If so, was the plaintiff injured thereby? A. Yes.

"3. What amount, if any, is the plaintiff entitled to recover by reason of such injury? A. $1,250."

The material assignments of error will be considered in the opinion.

Morgan & Ward for plaintiff.
Francis R. Stark and Alfred S. Barnard for defendant.

CLARKSON, J. Interstate messages are governed by the Federal rule which does not allow damages for mental suffering, pain or anguish, but only where "injury is done to person, property, health or reputation." It has been the unanimous holding in this jurisdiction that recovery can be had for mental suffering, pain or anguish for actionable negligence in the transmission of messages. *Waters v. Tel. Co.,* 194 N. C., 188.

It will be noted that at the close of plaintiff's evidence the defendant rested. There was no motion to nonsuit under C. S., 567. This was a waiver as to the insufficiency of the evidence to be submitted to the jury on the question of negligence. *Murphy v. Carolina Power & Light Co., ante,* 484.

The defendant, in apt time, requested the court below to charge the jury: (1) That upon all of the evidence, if believed by the jury, the plaintiff is not entitled to recover damages, and the jury should answer the second issue "No" and the third issue "Nothing." The court declined and refused to give this instruction, to which the defendant excepted and assigned error. (2) If the jury should find from the evidence, that notwithstanding the negligence of the defendant, the plaintiff by the exercise of due care could have avoided the injury, she would not be entitled to recover damages, and the jury should answer the second issue "No." The court declined and refused to give this instruction, to which the defendant excepted and assigned error. In the court's refusal we think there was no error.

It is well settled that a cause of action does not arise from negligence alone. It must be actionable negligence. The negligence must be the proximate cause or one of the proximate causes of the injury and damage must result. The burden is on the plaintiff to prove this.

"Proximate cause is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which the event would not have occurred." *Hinnant v. Power Co.,* 187 N. C., at p. 295. See *Brewster v. Elizabeth City,* 137 N. C., 392.

The telegram read "Come at once. Lawrence is seriously shot and can't live." The language is clear and unmistakable—it was a death message.

In *Hunter v. Tel. Co.,* 135 N. C., at p. 465, citing a wealth of authorities, it is held: "The second exception is to the refusal of the court to charge that the plaintiff could not recover in the absence of any evidence that the defendant knew or was informed of the peculiar and intimate relations existing between the plaintiff and the deceased child. Such instructions were properly refused, as has been repeatedly held by this Court."

In *Cashion v. Tel. Co.,* 123 N. C., 267, it was held that while the relation of brother-in-law is not sufficiently near to raise any presumption of mental anguish, the actual existence of said anguish, if found as a fact by the jury, would entitle the plaintiff to recover substantial damages. In that case the Court says: "It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or *parent and child* are the common knowledge of the human race, as they are the holiest instincts of the human heart." *Hunter v. Tel. Co., supra; Lawrence v. Tel. Co.,* 171 N. C., 240.

The defendant contends: "When the plaintiff learned of the contents of the message, and that there had been a delay in its transmission and delivery, the law imposed upon her the active duty to take all reasonable steps to avoid injury. That is to say, when the plaintiff learned from another source that her son had been seriously shot in Asheville, she was obliged to make some reasonable effort to reach his bedside before he died, and if, by the exercise of reasonable diligence, she could have reached his bedside before his death and thereby avoided the injury of which she complains, and she failed to do so, the negligence of the defendant, if any, cannot be regarded as the proximate cause of her injury, for she cannot recover from the defendant compensation for an injury which is attributable to her own negligence."

The court below properly defined negligence, proximate cause and damage. On the above aspect, relied on by defendant, charged the jury: "The court charges you as a matter of law that it was the duty of the plaintiff to do whatever she reasonably could to reduce or lessen the damages or to prevent damages entirely resulting from the failure of the defendant company to deliver the message, and if you find that she got the information from other sources that her son had been injured, and got it in sufficient time that she could, in the exercise of reasonable diligence, have got to his bedside before his death, and could have relieved her mind from all mental anguish resulting from the failure of the defendant company to deliver the message, or could have prevented any mental anguish arising on account of such failure to deliver the message, then it would be your duty to answer the second issue 'No.' I simply mean by that if you find the defendant company was negligent, even so, if you find that the plaintiff got the information as to her son's injury and got it in sufficient time that she could have reached his bedside and not have incurred any mental anguish whatever as a result of the failure to deliver the telegram, then the defendant company would not be liable, and it would be your duty to answer the second issue 'No.' "

We think the charge ample to cover that aspect of the case. In an action for tort committed or breach of contract without excuse, it is a well settled rule of law that the party who is wronged is required to use due care to minimize the loss. *Mills v. McRae,* 187 N. C., 707; *Construction Co. v. Wright,* 189 N. C., 456; *Monger v. Lutterloh,* 195 N. C., 274. The burden is on defendant of showing mitigation of damages. *Monger's case, supra,* at p. 280.

We think there was sufficient evidence to submit the case to the jury on negligence, proximate cause and damage.

The plaintiff, an old colored woman, was living in Waynesville, N. C., about 300 yards from the defendant company's office, and had been living there for ten years. She was at home 27 December, 1926. The death telegram was sent from Asheville, N. C., early that morning—7:33 a.m.—and received at Waynesville at 8:01 a.m. Trains leave Waynesville for Asheville, some thirty-two miles away, at 11 o'clock a.m. and at 5 o'clock p.m. Plaintiff's son died at 6:05 a.m. on the morning of the 28th. Plaintiff went on the 11 o'clock train on the morning of the 28th and got to Asheville some five or six hours after her son had died. Plaintiff's cousin told her the evening of the 27th, after the last train had left Waynesville at 5 o'clock for Asheville, that her son was shot. He saw an account of it in the evening paper. The plaintiff was an old woman, some 56 years old. It rained all night. As to her efforts to get to Asheville, other than by train, she testified: "My sister said she would let us have her automobile, but she couldn't drive it and I couldn't. I went to Asheville to see my son on the first train the next day. I think it was due to leave Waynesville about 11 o'clock, but it was after that when we left. I did not have any other way of getting to Asheville, except on the train." It is a matter of common knowledge that driving an automobile at the best over a mountain road on a rainy night is fraught with danger—liable on such a night to be foggy. This was a matter for the jury in connection with all the facts and circumstances.

Lawrence Gibbs was 39 years old—her oldest son. He often came to see his mother. After being shot between 2 and 3 o'clock on the morning of 27 December he died next morning, the 28th, about 6:05. He was conscious and knew people all the time. Plaintiff, as to her mental suffering, said: "I never felt right about not getting to the bedside of my son before he died, because I think I ought to have seen my child, and I could have seen him if I had gotten the telegram. . . . I just can't stand to talk about it." It was the cry of the old negro mother for her offspring. She was not there to give consolation in the dying hour of her first-born. Her mental suffering cannot, perhaps, be measured in dollars and cents.

On the question of damages, when a general rule is given in the charge correct, it has been repeatedly held by this Court that if defendant desired the charge to be more specific, he must request it by proper prayers for instruction. It may be noted that the exceptions and assignments of error to the charge are not in accordance with the rule of this Court. *Rawls v. Lupton,* 193 N. C., 428.

Defendant, a public service corporation, has promulgated strict regulations, which the courts have ordinarily upheld, and the public doing business with it are bound to obey. It had a fixed charge for a telegram from Asheville to Waynesville and received its fixed price to deliver a death message calling a mother to the bedside of her dying son. Defendant admittedly breached its contract. Defendant says, "An award of twelve hundred dollars in a case of this kind is such as to shock both the reason and the sense of justice of any fair-minded man." The court below duly cautioned the jury: "The defendant says it is true that the plaintiff has suffered sorrow and anguish, but says that has resulted from the death of her son, and not because of any negligence on its part, and I want to caution you right here that in determining plaintiff's damages, if any, you could not allow anything for mental anguish resulting from the death of her son alone, because the defendant company is not responsible for his death; they did not shoot him. You can only consider such mental suffering as was reasonably within the contemplation of the parties and as a consequence of her failure to see her son and talk with him prior to his death, resulting from the failure of the defendant company to transmit and deliver the telegram." The matter of damages was for the jury to determine.

Mental suffering is as real as physical. This is the experience of every normal person. The case was tried with exceeding care in the court below. In law we find

No error.

BROGDEN, J., dissenting.

STATE v. HERMAN LAMBERT, ALBERT ALLISON AND HENRY McCOY.

(Filed 16 January, 1929.)

1. **Larceny—Offenses and Responsibility—Principals.**

Where upon the trial for larceny from a dwelling there is evidence tending to show that the several defendants indicted therefor were actually or constructively at the place of the crime either aiding, abetting, assisting, or advising its commission, or were present for such purpose, it is sufficient to be submitted to the jury as to the guilt of each of them as principals in the crime.

2. **Larceny — Prosecution and Punishment — Possession as Evidence of Larceny—Unlawful Breaking and Entering—Burglary.**

Where several defendants are on trial under an indictment for breaking into the dwelling of another and for larceny therefrom, evidence that the stolen goods were found some three days after the committing of the offense in the possession of them all, is sufficient with other facts and circumstances to take the case to the jury under the doctrine of "recent possession," including the unlawful breaking and entering into the dwelling otherwise than burglarious entering.

3. **Criminal Law — Evidence — Weight and Sufficiency — Circumstantial Evidence.**

Circumstantial evidence, when of a sufficiently probative force, will take the case to the jury.

4. **Trial—Instructions—Construction.**

The charge of the court to the jury, if correct when construed as a whole, will not be held for error.

APPEAL by defendants, Herman Lambert and Albert Allison, from *Moore, J.*, and a jury, at July-August Term, 1928, of SWAIN. No error.

Herman Lambert, Albert Allison and Henry McCoy were indicted for breaking and entering the dwelling-house of Mose Owl, and stealing certain personal property therefrom. There were also counts in the bill of indictment for larceny and receiving stolen goods knowing they had been stolen. They pleaded not guilty, and all three were convicted of breaking and entering otherwise than by burglarious breaking, and duly sentenced. The defendant Henry McCoy did not appeal.

Mose Owl testified: "The goods were stolen on Thursday evening, 31 May, 1928, and found on the following Monday morning, between 1 and 2 o'clock. He and his family left home about 6 o'clock Thursday evening to attend an entertainment and returned home that evening about 11 o'clock. There was missing from the house a 25-20 Winchester high-power gun, a box of shells, a sack of 'Town-Cryer' flour, 50 pounds of sugar, in two 25-pound sacks, a dollar's worth of meat, a pair of scissors, some slippers and a shawl. The property was worth about $50. Henry McCoy, the day before the house was broken into, about 1 o'clock, stopped at Mose Owl's house for about ten minutes and asked him if he was going to the entertainment. Mose Owl identified the gun; it was marked on the barrel. The other property, 'All I say is that they are like mine.' "

Arnold Cooper testified: "That he was with the officer (Sutton) when they went to defendant's, Herman Lambert's, house. They found 50 pounds of sugar, 25-pound sack of 'Town-Cryer' flour; it had not been opened. It was found in the bed covered up, that defendant Herman Lambert said he had gotten out. The shawl was found about two weeks later. The cartridges were in defendant Albert Allison's pocket. The three defendants were all in Herman Lambert's house, a little cabin of one room. All three of the defendants were seen together on Sunday. In the house was found also a pair of pants and belt that belonged to witness. At the preliminary hearing Tom Lambert, the father of Herman Lambert, told the court that Henry McCoy, the defendant, had something he wanted to say, and they told him to go ahead, and he said he wanted to say he would take all the blame on himself, and that the other boys did not have anything to do with it. He found the scissors and slippers in a duck sack coat defendant Herman Lambert said was his. Found the shawl about two weeks afterwards near Tom Lambert's place. With the shawl he found a coat, a couple of shirts and a pair of shoes that had been taken from him. Herman Lambert stated none of the stuff belonged to him. He also said that Albert Allison had been wearing the coat."

Mrs. Mose Owl testified: "I am the wife of Mose Owl. I know that shawl; it is mine. We missed it the night the other stuff was taken from our house."

A. J. Sutton, a deputy sheriff, was with Arnold Cooper in the searching party. They knocked, and it was about thirty minutes before they were let in. "There were two beds in the house and they were pretty close together, and this one (Herman) Lambert was sleeping in looked like some one else was in it. He said that was where he slept, and that nobody else was in the bed. The table was up against it and the boys kept looking and searching and come to the bed and throwed the cover back and pulled out two twenty-five pounds of sugar, and a sack of flour and a piece of meat and some pants and one stuff and another was wound up in the cover, and I asked him if that was his, and he said it wasn't; he didn't know anything about it. We went ahead and got that and hunted all around everywhere in the house. That gun was under the bed where the other boys were sleeping. I never saw them pull that out. There was a flashlight lying on the table, and I said, 'Whose is this?' and nobody owned it. (Herman) Lambert said it wasn't his, and then the scissors and slippers, nobody claimed them."

Tom Lambert was defendant Herman Lambert's father. When near his house, defendant Henry McCoy tried to escape, also defendant Albert Allison. Herman Lambert, after the stuff was found, said it wasn't his stuff and he knew nothing about it. The witness further testified: "The stuff was bound to have been put in after he got out of bed. It was rolled up in the cover, and the sacks were wet, and it had been put in the house that night. I don't remember in whose pocket I found the shells. Mr. Cooper and Mr. Sherrill (the other members of the searching party) pulled the gun out from the bed where McCoy and Allison were sleeping. The sacks were kinder wet. It had been brought in there that evening. It had been raining that evening and my idea is that some time late that evening or that night they brought it."

Herman Lambert and the other defendants testified in their own behalf. Herman Lambert set up an alibi and denied breaking into Mose

Owl's house. He contended that Henry McCoy brought the stuff to his house. "He said, 'If you are going home I have some stuff I want to take up there. I am going out to the mountains, and I have a sack of flour and some meat. I will put it in for board while I am at your house.' . . . I waked up; there was somebody hollering in the yard, and I called and asked them what they wanted and they told me; and I put on my clothes and told them to come back to the other door and come in, and while I was putting on my clothes Henry (McCoy) jumped up. I never noticed what he was doing; and they come in and found this stuff in my bed, and I knew nothing about it. I knew it was in the room, but not in the bed. I never put it in the bed. He said he was going towards Cooper's Creek Bald. He said he was going to put up and make some liquor out there; said he wanted to get some money to leave here on. I didn't know that it was stolen stuff. . . . That evening Henry McCoy left me at the forks of the road and went home, and Albert Allison went home with him and ate supper at their house, and I ate supper at my daddy's and got the key for the house. I first saw this stuff when he had it about a quarter of a mile from Morgan Bradley's house sitting by the side of the road where a pine tree had been cut. I first found out where it was that night; that was Sunday night after it was stolen. My wife wasn't at home; she was at her mother's. She was there on the night of the 31st. I don't know who put those scissors in that coat pocket. I hadn't had that coat on since Friday. Allison had been wearing the coat."

Albert Allison testified that he was 23 years old. He set up an alibi and denied breaking into Mose Owl's house. "Henry McCoy said he had some stuff; that he was going to the mountains next week. At that time I had heard that Arnold Cooper's house was broken into. That night he said he had some stuff—some flour and meat—to put in on his board while he stayed at Herman Lambert's. We got the stuff, and we went down the road. Henry gave me some Winchester cartridges, and I carried the Winchester and something in a sack, and we set it by the door. All the stuff was in sacks. There was three or four sacks. Me, Herman and Henry carried one. The stuff was hid a little piece from Morgan Bradley's under some pine brush in the woods. It wasn't but a little piece off the road. We got to Herman Lambert's house about ten o'clock. Henry said he was going to make liquor with this stuff. He said he was going toward Cooper's Creek Bald. When we went to the house we set the stuff down next to the door and got in bed. Henry and me got in the bed together, and Herman Lambert got in the other bed, and when I waked up Henry waked me getting out of the bed, and he grabbed the stuff and rolled it up in the bed. I saw him do that; that was while Herman was putting on his clothes; then he came back and got the Winchester; it was sitting by the door, and put it under the bed. He didn't try to leave, but he come back and got back in the bed with me after he put the Winchester under the bed. When I got up I told the officers that I didn't have anything to do with it. Herman Lambert said the stuff didn't belong to him, and that he didn't know anything about it. In regard to where they found the scissors I heard him tell them that he hadn't been wearing that coat. I had been wearing the coat for a day or so. At the time I helped carry the stuff I didn't know it had been stolen. When Henry told me he had the stuff hid he said he was going to the mountains to make liquor—to make a run of beer. After I found that it was stolen I never touched it. . . . I didn't know it was stolen goods when I saw Henry putting it over in the bed. It looked suspicious. When they knocked on the door Henry McCoy hopped out of bed and took the stuff and put it in the other bed. I saw him do that. I didn't do anything. Henry gave me the cartridges in the presence of Lambert on Sunday morning. I found the gun on Saturday night, and he gave me the cartridges on Sunday evening, I think. He didn't say anything, only he wanted me to carry the cartridges, and I kept them in my pocket. I told Mr. Cooper about them and gave them to him as we come down the road. . . . This stuff we found about a mile and a half of Mose Owl's house. I heard there had been some property stolen at Arnold Cooper's, but not at Mose Owl's. That was the report in the community. I knew that, and never asked Henry where he got his stuff; it wasn't any of my business. We slept in the barn that night because it was warm, and we didn't want to wake up Tom Lambert. I hadn't been into anything that night. We didn't want to wake up Uncle Tom and sleep in a bed. That was Saturday night. That was the night I got hold of the gun."

Ed Welch testified: "I knew where Mose Owl lives. I saw Henry McCoy right above Mose Owl's about 7 o'clock on the evening of the 31st. I didn't see anybody else there. I just saw him; he was coming toward Mose Owl's by himself. (Cross-examination): I saw Henry on Thursday night. I met Henry about twelve o'clock that night above Mose Owl's on the road."

Henry McCoy set up an alibi. He testified: "On Sunday morning I went down the highway and was fooling around and got in with Herman Lambert and Albert Allison, and fooled around until about 12 o'clock, and then Albert stayed with me till after supper, and Herman come and said he wanted us to go home with him, that his wife was gone, and he got us to go with him, and we went on down the road, and he had some stuff that he said he wanted to take up. We found this stuff, and I didn't know what it was, but he had the gun. I saw the gun. The stuff was on a ridge over from Tom Lambert's. We took the stuff and went on up to Herman's house, and it got to raining before we got there, and there was a little shed, and we stopped there out of the rain, and I went to sleep, and when I waked up it was something like 12 o'clock, and we hadn't been in bed long, but had gone to sleep when the officers come, and when I waked up Herman was up, but there wasn't any light. I could hear him walking around, and I heard the officers at the door hollering, and he lit the light, and said must he let them in, and I told them to let them in, and he opened the door and let them come in. I didn't know where the stuff come from, and it was in sacks, but I had heard that Mose Owl had lost a gun, and I had an idea that this was his gun. I carried a sack of flour. When they found this stuff in the house I didn't get up out of bed. I don't know how long it was from the time the officers got there until they come in the house. I didn't wake up when they first come. It was about five minutes after I woke up before he lit the lamp. I don't know who put the stuff in the bed; it was there when the lamp was lit. It was the same stuff I helped carry up there. I carried a sack of flour. The last time I saw the stuff it was sitting over against the door. The next time I saw it the officers took it out of the bed, and Herman was up in the house. None of that stuff was mine—not a thing. Q. Did you have any idea these boys had stolen these goods at that time? A. I didn't know who put it there. . . . . About the statement I made: I was sitting around there. Mr. Martin had turned us out in the run-around, and I was sitting looking out the window, and Herman Lambert and Allison came around there and Herman had a window weight in his hand, and he asked me what I was going to swear, and I said I didn't know anything to swear, and I was just going to tell the truth, and he said, 'If you don't own this and tell that me and Albert didn't have anything to do with it, I will kill you when you get out.' . . . I have been indicted for stealing a time or two. I was indicted for breaking into Lambert's store. I was indicted in one liquor case and worked on the road for it. I made some liquor that time. I wasn't going to make it out of this sugar. I didn't have any sugar. . . . I submitted to making the liquor. I have been indicted two or three times for stilling and house-breaking." He denied what his codefendants testified to against him.

Gomer Martin testified: "I am the jailer. I heard Tom Lambert make a statement in jail. He told them to keep their mouths shut and not to talk; if they knew anything not to tell it. Henry McCoy complained to me about being afraid of these other two boys. He said they had threatened to kill him if he didn't take this on himself. That is what he told me shortly after the hearing. I don't know that he said anything about being afraid to go to sleep, but they had a window weight in there somehow, and I got it out. . . . The general reputation of Albert Allison is bad, and Herman Lambert and Henry McCoy the same."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. G. Hall, E. P. Stillwell and Moody & Moody for defendants.

Clarkson, J. All who are present, either actually or constructively, at the place of the crime, and are either aiding, abetting, assisting or advising its commission or are present for such purpose, are principals in the crime. *S. v. Gaston,* 73 N. C., 93; *S. v. Jarrell,* 141 N. C., 722; *S. v. Cloninger,* 149 N. C., 567; *S. v. Baldwin,* 193 N. C., 566.

In *S. v. Ford,* 175 N. C., at p. 800, the law is stated: "The doctrine of recent possession, as applied in the trial of indictments for larceny, frequently leads to the detection of a thief, when without it the guilty would go free, but the temptation to shift evidence of guilt from one to another, and the ease with which stolen property may be left on the premises of an innocent person, make it imperative that the doctrine be kept within proper limits, and as *Lord Hale* says, 2 Pleas of the Crown, 289, 'It must be warily pressed.' . . . The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent and as the other evidence tends to show it to be exclusive. *S. v. Rights,* 82 N. C., 675; *S. v. Record,* 151 N. C., 697."

In *S. v. Hullen,* 133 N. C., 656-660, speaking to the subject: "If recent possession of the stolen goods is evidence that defendant committed the larceny it must also of necessity be evidence of the fact that the defendant broke and entered the house, because it is evident that the larceny was committed in the house by the person who broke and entered it, and there is no evidence that it was committed in any other way. *S. v. Graves, supra* (72 N. C., 482)." *S. v. Williams,* 187 N. C., 492; *S. v. White, ante,* 1.

In 9 C. J., p. 1082, it is said: "Proof of possession of defendant, shortly after the burglary, of goods stolen at the time of the burglary, is to be considered by the jury, and if unexplained, and if breaking and entry by some one is shown, will be sufficient, when accompanied by other circumstances tending to connect him with the commission of the offense, to warrant conviction, although the other evidence might not alone be sufficient. In the note below reference is made to cases in which the evidence of possession of stolen property, together with other circumstances, was held sufficient to sustain a conviction." A case in the U. S. Court and cases in twenty-one States of the Union are cited in support of the above principle. *S. v. Hullen, supra,* is cited.

We have examined the evidence with care and the charge of the court below. The evidence as to the breaking and entering on the part of the defendants is circumstantial. The goods were stolen Thursday evening, and some three days afterwards were found in the possession of defendants according to the officers, about 1 or 2 o'clock Monday morning. The defendants lived in the vicinity of the house that had been burglarized. The stolen goods, perhaps, could not be carried easily by one person. Before being taken to Lambert's house, they had been lying out—the sacks were wet. The property of another that was stolen in the vicinity was found in the house where the goods in controversy were found, all defendants being present. When the goods were found, conflicting statements were made by defendants. The general reputation of defendants was bad. All these and other circumstances, we think, sufficient evidence to be submitted to the jury for them to pass on as to a joint enterprise of all the defendants in the burglary. The probative force was for the jury to determine.

Taking the charge as a whole, we think the court below charged the law correctly in regard to circumstantial evidence. The rule of reasonable doubt was frequently applied, and on the whole evidence the charge on recent possession of stolen goods as evidence of breaking and entering, we cannot hold as reversible error. We cannot say the charge of the court impinged on C. S., 564.

We have carefully read the record and briefs, and we find no reversible error.

No error.

J. R. CHRISTOPHER v. NORTH CAROLINA TALC AND MINING COMPANY, INC.

(Filed 16 January, 1929.)

Master and Servant—Liability of Master for Injuries to Servant—Safe Place to Work—Nonsuit.

Upon evidence tending to show that the *alter ego* of the defendant mining company instructed the plaintiff, an inexperienced man, to proceed to dig for talc at a certain place in its tunnel, without warning or instructing him of the danger, and the *alter ego*, after a cursory examination, pronounced the place safe, and within a few moments thereafter the plaintiff was injured by the caving in of the mine from an overhanging ledge: *Held*, defendant's demurrer to the sufficiency of the evidence upon the issue as to defendant's negligently failing to furnish the plaintiff a safe place to work, in the exercise of due care, is properly overruled. C. S., 567. *Mace v. Mineral Co.*, 169 N. C., 143, cited and distinguished.

APPEAL by defendant from *Harwood, Special Judge,* and a jury, at September Term, 1928, of HAYWOOD. No error.

This is an action for actionable negligence brought by plaintiff against defendant. Defendant denied negligence and pleaded contributory negligence and assumption of risk.

The specific allegations of negligence relied upon by the plaintiff are: "The negligent failure to provide plaintiff with a reasonably safe place to work, negligent failure to make proper inspection of the tunnel, in order to ascertain the danger to the plaintiff, which danger was unknown to the plaintiff, by reason of his inexperience, and which was known and could have been ascertained by the defendant by proper inspection, in the exercise of due care. The failure to exercise due care to brace the walls of the tunnel so as to render safe the place where the plaintiff was required to work in the discharge of his duty; and negligently required the plaintiff to work in a place of danger, which could have, in the exercise of due care, been ascertained by the defendant by the exercise of reasonable inspection, and which dangers were unknown to the plaintiff."

The evidence: The plaintiff was 53 years old, and for about three months before his injury had been working for the defendant, assisting in getting out acid wood; working two weeks in a rock quarry and three days mining for talc. While working in the quarry, defendant's foreman, Mr. Day, called upon one Ivester and the plaintiff to take a pick and shovel and go prospecting for talc. They went out prospecting, and in a short while Ivester found a place he thought contained talc, and called plaintiff to where he was working. A short while later Mr. Day, the foreman, came and looked at the place and he and plaintiff and Ivester for the remainder of that day (Friday) and all day Saturday, and was at the mine Monday morning a few minutes before plaintiff was injured. The place where plaintiff and Ivester were working under Davis' supervision was an old mine, previously operated. While Mr. Day, the foreman, was present, he did most of the digging, the plaintiff and Ivester throwing the dirt back and sorting out the talc. The place they were working was beside of a ledge of rock, with an overhanging rock, one end of which was resting on the ledge and the other end on another stone. The tunnel had been cut through the dirt and between and underneath the rocks and the dirt had been removed back some distance in the hill beyond the rocks, the rocks forming a sort of portal. One of these rocks had moved about an inch, and on Saturday apparently there had been two 6 x 6 braces put across the portal and driven in to hold the rock from moving further. On Monday morning the plaintiff and Ivester were sent to the place of work and told to go ahead. Mr. Day came in half an hour. Plaintiff had dug down about two wheelbarrows full of dirt and was ready to throw out the same when the foreman, Mr. Day, arrived. Mr. Day looked around the mine, said it looked all right, and told plaintiff and Ivester to go ahead with the work, and he would be back in a short while, or as soon as he took some other men to "Hoot Owl." Mr. Day had been gone only three or four minutes when the plaintiff, who was down on his knees shoveling the dirt back over his head, saw what looked like water on the rock, examined and found it was water. He immediately got up to get out of the mine, and while stooping to go under the two braces above mentioned, was struck by a large block of dirt falling from the side of the wall and knocked up against the stone on the opposite side, raised up to go over the top of the braces, found he could not do so, again stooped to go under the braces, when several tons of dirt and stone slid from the slanting rock forming the ledge on one side of the tunnel and was crushed against the opposite bank, hurt both his shoulders, "bursted" one, three ribs broken and other injuries sustained.

Plaintiff was an inexperienced man, having never before worked in a mine, was given no warning or instructions whatever of the dangers incident to his employment; was not instructed to brace the mine or furnished any bracing material with which to brace the mine. Defendant did not inspect the mine further than to look around, and said "it looked all right."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff assume the risk of being injured in the way and manner he was injured, as alleged in the answer? Answer: No.

4. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $1,000."

C. A. Cogburn and Robbins & Smathers for plaintiff.
Alley & Alley for defendant.

CLARKSON, J. At the close of plaintiff's evidence, defendant moved for judgment as in case of nonsuit. C. S., 567. The court below denied the motion, and in this we think there was no error.

We think there was sufficient evidence to be submitted to the jury.

This action is similar to *Buchanan v. Furnace Co.,* 178 N. C., 652. In that case the whole subject is thoroughly discussed. See *Street v. Coal Co., ante,* 178.

Defendant relied on *Mace v. Mineral Co.,* 169 N. C., 143. In that case the foreman, an experienced miner, was killed in a mine by falling rock and dirt. The workmen in the mine were under his authority. The manner and method of doing the work was left to the foreman's judgment—he being in charge and had to use due care to make the place to work safe, as he went, for those under him. As it were, under the circumstances, he made his own place to work. *Heaton v. Murphy Coal & Iron Co.,* 191 N. C., 835. We find in the record

No error.

STATE v. SAM WILSON, AARON GARDNER AND JOHN COX.

(Filed 16 January, 1929.)

Appeal and Error—Exceptions—Necessity Therefor.

Where no exceptive assignments of error are made in the lower court the alleged error will be considered on appeal.

APPEAL by defendant, John Cox, from *Nunn, J.,* at August Term, 1928, of PITT.

Criminal prosecution tried upon an indictment charging the defendant with larceny of four bags of nitrate of soda, the property of one Hugh Stokes, and with receiving same knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: Guilty of receiving.

Judgment: Three years on the roads.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Albion Dunn and P. R. Hines for defendant.

PER CURIAM. Several irregularities are observable on the record, but the case contains no exceptive assignment of error of sufficient merit to warrant a new trial. The defendant was not represented by counsel in the court below. The verdict and judgment will be upheld.

No error.

J. A. WITHERS ET AL. v. BOARD OF COUNTY COMMISSIONERS OF HARNETT COUNTY ET AL.

(Filed 23 January, 1929.)

1. **Elections—Conduct of Elections—Secret Ballot—Constitutional Law.**

The provisions of Article VI, section 6, of the State Constitution that all elections by the people shall be by ballot and all elections by the General Assembly shall be *viva voce* implies that in elections by the people the ballot shall be a secret one.

2. **Same—Ballot Boxes.**

By providing a ballot box for an election, with two separate slots in which the ballots are to be deposited, each plainly marked so as to indicate whether for or against the measure, in the presence of those favoring or opposing the measure, the secrecy of the ballot is not maintained in accordance with the mandate of our State Constitution, Art. VI, sec. 6, though the box itself has no partition to separate the ballots which are commingled for the count.

3. **Same—Rights of Voter.**

The privacy of voting at an election of the people is a personal privilege given to each voter.

4. **Same—Waiver of Right to Secret Ballot.**

A voter at an election does not waive his constitutional right to a secret ballot, Const., Art. VI, sec. 6, by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting.

5. **Same—Undue Influence—Intimidation.**

It is not necessary to show undue influence or intimidation for the courts to declare an election void when the voters have been deprived of their right to a secret ballot. Art. VI, sec. 6.

6. **Appeal and Error—Review—Harmless Error.**

When on appeal the decision of the Supreme Court makes the action of the judge in granting a restraining order immaterial, it becomes unnecessary for the court to discuss error alleged in this respect.

CIVIL ACTION, before *Daniels, J.*, at August Term, 1928, of HARNETT. The plaintiffs are taxpayers and residents of what is known as Harnett County School District No. 80, and the defendants are the duly elected, qualified and acting Board of County Commissioners of Harnett County.

A special school election was held for the purpose of levying a tax in said district. There were six hundred and fifteen registered voters, and of that number three hundred and sixty-one votes were cast in favor of local tax, and eighty-three votes were cast against local tax. At the hearing three hundred and forty-two registered voters signed an affidavit to the effect that all ballots for said election were cast freely, voluntarily, and openly, and further, that all of said affiants were "thoroughly satisfied with the manner in which said election was conducted."

Thereupon, the following judgment was entered:

"This cause being heard at Smithfield, N. C., on 11 August, 1928, and plaintiffs, for the purpose of this hearing, having waived their objections other than that a ballot box was held by the election officer, having two slots, one marked 'For Special Tax' and one 'Against Special Tax,' and that no opportunity was offered voters to cast a vote in any box except the one so marked, and the court finding as facts that such a box was so founded and used; and no other opportunity was offered voters to vote except them; and the court being of the opinion that said election is therefore void, it is ordered that the restraining order heretofore granted be continued to the hearing."

From the foregoing judgment the defendants appeal.

Hoyle & Hoyle for plaintiffs.

I. R. Williams, N. McKoy Salmon and Charles Ross for defendants.

BROGDEN, J. The question of law for decision is whether or not the ballot box provided for the election and the casting of votes therein was in violation of the Constitution of North Carolina.

The ballot box had no partition, and all votes, whether placed in the slot labeled "For Special Tax," or in the slot labeled "Against Special Tax," were therefore deposited in the same ballot box, and all said votes were properly counted and canvassed. Article VI, section 6, of the Constitution of North Carolina, provides that "all elections by the people shall be by ballot, and all elections by the General Assembly shall be *viva voce.*" The overwhelming weight of judicial authority is to the effect that a vote by ballot implies a secret ballot. The general principle is thus stated in 20 C. J., p. 175: "The constitutional provisions that all elections shall be 'by ballot' imply secrecy of voting, as distinguished from *viva voce* voting; and in some jurisdictions secrecy of the ballot is regarded as a rule of public policy that cannot be waived." 9 R. C. L., 1046-47.

This Court has adopted the prevailing construction of the constitutional provision in the case of *Jenkins v. Board of Elections,* 180 N. C., 169. That case involved the constitutionality of the absentee voters law. *Brown, J.,* writing for the Court, said: "The plaintiff contends that the statute violates the provision of our Constitution which provides that elections by the people shall be by ballot, arguing that this means a secret ballot in all elections. We admit that voting by ballot, as distinguished from *viva voce* voting, means a secret voting, and that the elector in casting his ballot has the right to put it in the box and to refuse to disclose for whom he voted, and that he cannot be compelled to do so. But this privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted in this country for the protection of the voter, and for the preservation of his independence, in the exercise of this most important franchise." *Boyer v. Teague,* 106 N. C., 625, 11 S. E., 665.

The South Carolina Court in *State ex rel. Birchmore v. State Board of Canvassers,* 78 S. E., 451, declared: "Therefore, if a general election is held *viva voce* or there are such other irregularities as practically amount to such voting, and the electors are deprived of their constitutional right to secrecy in casting their ballots, the election is void."

The registrar filed an affidavit containing the following paragraph: "That at the said election there was a box prepared for the voters to cast their ballots in, and in the said box there were two openings, or slots, in the lid, one of which was designated as a place for those voting in favor of the proposition submitted to place their votes and the other for those against the proposition to place their ballots, but that all of the said ballots went into the same box; that this arrangement was not made for the purpose of trying to influence any one to vote otherwise than he or she would have and did vote, but for convenience of those who were making an effort to secure a majority of the votes for the election." This paragraph from the affidavit discloses the purpose of providing two slots in the ballot box. Those who were interested in carrying the election for the special tax were desirous of knowing or ascertaining how strong the opposition was to the proposal, in order that they might send out for reinforcement if the fight became too hot or the result too doubtful. Undoubtedly, this was a laudable proposition, and a worthy undertaking in securing better school facilities for the community, but the constitutional provision was designed and intended to protect every voter, however humble or timid, from being compelled to run the gauntlet of publicity in expressing at the polls his free and untrammeled judgment upon the question at issue. Furthermore, the constitutional provision was intended and designed for the protection of the voter himself in drawing about him, if he so desired, the impenetrable veil of secrecy. The franchise has been won at an enormous cost, and the exercise thereof should be free from every extraneous influence and impelled only by the best intelligence and best judgment of the individual who seeks in this manner to express his will upon the questions affecting his welfare.

In the case at bar there was no evidence of undue influence or intimidation, but there was a denial of that secrecy guaranteed by the Constitution, and the election ought not to stand.

The defendants, however, contend that all votes were counted irrespective of the slot in which they were placed, and that, as no protest was made by any voter, the constitutional privilege was thereby waived. Some of the courts hold that such waiver would be contrary to public policy, and moreover that a constitutional provision cannot be waived except by the voluntary act of the voter himself. However, before a voter can be charged with a waiver of his constitutional rights he must have full knowledge of those rights and of all the surrounding facts which will enable him to take effectual action to protect himself. The record does not disclose that voters were advised that they could place their ballots in either slot, or that there was no partition in the ballot box. When a voter went to the box to cast his ballot the marking upon the box plainly indicated that if he desired his ballot to be counted for the proposal it should be placed in one slot, and if he desired it to be cast against the proposal, it should be placed in another slot. In the absence of such explanation and of such knowledge, we cannot hold that the principle of waiver or estoppel applies in this case.

A question was raised as to the power of Judge Daniels to issue a restraining order. We do not discuss this phase of the case because the conclusion which we have reached upon the question of the validity of the election renders such discussion unnecessary.

Affirmed.

J. B. HAWKINS v. W. C. CARTER.

(Filed 23 January, 1929.)

1. **Contracts—Rescission or Abandonment—Rescission for Fraud.**

   Where a party enters into a contract to take over and complete the building of a highway, and upon setting about the completion of the highway discovers fraud in the procurement of the contract in misrepresentations as to the conditions of the highway, etc., he must rescind the contract upon the discovery of the fraud, and he cannot proceed under the contract and complete the highway and thereafter sue to rescind the contract for fraud in the procurement, and for his damages.

2. **Election of Remedies—Contracts—Fraud.**

   A party may not elect his remedy and sue upon a contract and thereafter bring an action to rescind the contract for fraud in the procurement.

APPEAL by defendant from *Harding, J.*, at .... Term, 1928, of MECKLENBURG. Reversed.

W. C. Carter, the defendant in this action, brought an action against J. B. Hawkins, the plaintiff in this action, in Alamance County, N. C. The summons was issued on 29 January, 1927, and duly served 31 January, 1927, and complaint was filed the same day. The action was for the recovery of $1,500, balance due on contract. The defendant in that action denied owing the $1,500; set up a different agreement in regard to the same transaction. That it was a road contract on which $1,000 was paid and the additional sum of $1,500 would be paid "if the defendant could make any reasonable profit on said contract. . . . When the building of said section of road was completed." That defendant completed the road, and not only made no profit, but lost a large sum of money. This action was pending in Alamance County, N. C., on 8 November, 1927, when J. B. Hawkins instituted an action in the Superior Court of Mecklenburg County, N. C. The summons was duly served and complaint filed charging W. C. Carter with fraud growing out of the same transaction. This aspect will be considered in the opinion. Before the time to answer had expired, the defendant, W. C. Carter, filed a demurrer, which, by consent of the parties, was treated as a motion to dismiss, as follows:

"For the reason that there is another action pending between the same parties for the same cause in General County Court of Alamance County, a court with concurrent jurisdiction with the Superior Court."

On the motion to dismiss W. C. Carter filed the record in the action in Alamance County, showing the summons, when issued and served, complaint and answer, the pendency of the action.

The court below rendered judgment overruling the motion to dismiss. The defendant excepted, assigned error and appealed to the Supreme Court.

J. D. McCall and J. F. Newell for plaintiff.
T. C. Carter and McLendon & Hedrick for defendant.

CLARKSON, J. May a defendant, who is sued on a contract, file an answer denying the contract as alleged, and set up a different version of the contract as a defense, and then while that action is pending maintain a separate action, in a different county, against the plaintiff in the first action as defendant, claiming damages for alleged fraud in the procurement of the contract, when he knew all the working conditions of the highway, and with this knowledge he did not rescind, but completed the contract? Under the facts and circumstances of this case, we think not.

In the Alamance County action J. B. Hawkins, defendant in that action, in his answer, says: He "agreed to take over the contract which the plaintiff (Carter) had with the South Carolina State Highway Commission for the construction of a section of highway in Florence County, South Carolina, *and to pay the plaintiff the sum of $1,000 for said contract; and, further, if the defendant could make any reasonable profit on said contract, to pay the plaintiff an additional sum of $1,500 when the building of said section of road was completed.*" In his complaint in the case commenced by him in Mecklenburg County, he alleges the contract to be as follows: "That relying upon the representations made to him by the defendant, the plaintiff did agree to take over the contract, and at that time *agreed that if the profit was in the work as represented by the defendant, that he would pay him the sum of $2,500; that relying upon said representations and acting upon same, the plaintiff did pay the defendant the sum of $1,000 at the time he made the agreement to take over the contract with the understanding with the defendant that the conditions surrounding the work to be done were as he had represented.*" Other allegations, not material for the consideration of the case, were made and the prayer was for damages in the sum of $7,500.

In the complaint in the action in Mecklenburg County we do not think actionable fraud will lie; the interesting questions presented do not arise on the record, as to election of remedies and actionable fraud after suit on contract.

In Pollock on the Law of Torts (1923), (12 ed.), p. 283-4, the rule is well stated: "To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must occur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be true, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage." *Corley v. Griggs,* 192 N. C., at p. 173; *Stone v. Milling Co.,* 192 N. C., 585.

In *Hoggard v. Brown,* 192 N. C., at p. 496, it is said: "It is established law in this State that, in pleading fraud, the facts constituting fraud must be clearly alleged in order that all the necessary elements may affirmatively appear. *Nash v. Hospital Co.,* 180 N. C., 59; *Lanier v. Lumber Co.,* 177 N. C., 200; *Colt v. Kimball,* 190 N. C., 169."

The plaintiff in the present action took over the highway and completed it. He became well aware of the conditions surrounding the work and undertook and completed it with full knowledge. Based on the knowledge acquired he did not rescind the contract, but completed the job. After seeing, he relied on his own judgment and cannot now be heard to complain of the alleged fraud.

The principle is well settled in 9 R. C. L., at p. 965-6: "In accordance with the principles governing election of remedies or remedial rights, if a person is entitled to rescind a contract on the ground of fraud he loses his right if, after knowledge of all the facts, he brings an action to enforce the contract; or, if, on the other hand, he sues to obtain a rescission of the contract for the fraud, he cannot bring an action upon it as an existing obligation. This right to rescind a contract for fraud must be exercised immediately upon its discovery, and any delay in doing so or the continued employment, use and occupation of the property received under the contract will be deemed an election to affirm it. But if the positions with respect to the fraud are not inconsistent, and the plaintiff has taken no advantage and caused no prejudice to the rights of the defendant through one action, he is not precluded thereby from choosing another form of remedy. So the mere filing of a complaint for rescission will not preclude an amendment of the complaint so as to demand damages on account of the same fraud. On the breach of a contract, an election to sue upon it or to rescind it waives the right to assert the respectively inconsistent rights of suing to obtain a rescission or to assert any claims arising on it. Nor can a party who has elected to sue upon a written contract as it is, and has been defeated, thereafter bring an action to reform the contract."

In *Patton v. Fibre Co.,* 194 N. C., at p. 768, it is said: "It is well settled that one cannot secure redress for fraud where he acted in reliance upon his own knowledge or judgment based upon independent investigation." *S. v. Mayer, ante,* 454.

Defendant in the present action did not demur; to do so the pendency of the former action must appear on the face of the complaint. *Allen v. Salley,* 179 N. C., 147.

Grounds not appearing on the face of the complaint, the objection may be taken by answer. C. S., 517. *Allen v. Salley, supra,* at pp. 150-1. The motion to dismiss was accompanied with the record in the Alamance County action. We think it too technical to say that it was not sufficient. It was practically a plea by answer. It set up facts, the summons, complaint and answer in the Alamance County action, and moved to dismiss. For the reasons given, the judgment below is

Reversed.

STATE v. WILBUR McLEOD.

(Filed 23 January, 1929.)

1. **Homicide — Evidence — Weight and Sufficiency — Nonsuit — Circumstantial Evidence.**

Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain their verdict thereon of murder in the first degree. C. S., 4643.

2. **Criminal Law—Evidence—Circumstantial Evidence.**

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth upon the trial of a criminal offense.

3. **Criminal Law—Trial—Nonsuit—Evidence.**

Upon motion to dismiss under C. S., 4643, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it.

4. **Criminal Law—Evidence—Bloodhounds.**

The action of bloodhounds may be received in evidence only when it is properly shown that they are of pure blood, that they possess the powers of acute scent and discrimination between scents, that they have been accustomed and trained to pursue the human track; that they have been found by experience to be reliable in pursuit, and that in the particular case they followed the trail of the guilty party in such way as to afford substantial assurance, or permit a reasonable inference of identification, and where this last element is lacking the admission of evidence of their actions over defendant's objection is reversible error warranting a new trial.

5. **Criminal Law—Appeal and Error—Review—Harmless Error.**

Upon appeal the immateriality of error must clearly appear upon the face of the record for the Supreme Court to find it harmless.

BROGDEN, J., dissenting.

APPEAL by defendant from *Nunn, J.*, at May Term, 1928, of LEE.

Criminal prosecution tried upon an indictment in which it is charged that the prisoner, Wilbur McLeod, did on 28 March, 1928, unlawfully, wilfully and feloniously of his malice aforethought kill and murder one Rebecca Matthews.

The evidence on behalf of the State tends to show that in the early morning of 28 March, 1928, about 2 a.m., Mrs. Rebecca Matthews was found dead in a field approximately thirty yards from her house. She had been ravished by some one suffering from gonorrhea, such as the defendant had. Her death was caused by the assault, shock and choking. She was 77 years of age, and quite feeble. The prisoner's shoes fit the tracks seen near the house and leading from where the body of the deceased was discovered.

On this phase of the case E. L. Cobert, night policeman at Sanford, testified in part as follows: "I measured seven tracks on the ground where it left the house. I only measured three of the tracks across the field—ten altogether. I actually measured with a rule. Some of the tracks indicated the man was running, and some indicated that he was walking. Tracks where the toe made a deeper imprint and the distance between the tracks caused me to say he was running. I measured both the running and the walking tracks, and they measured identically the same. Two and a quarter inches from the heel to the half sole on one shoe and two inches from the heel to the half sole on the other shoe, and the measurement on the ground was identically the same as the measurement of the (prisoner's) shoes."

Soon after it was known that the deceased had been murdered, English bloodhounds ("Cockman" dogs), trained and accustomed to pursuing the human track, and found by experience reliable in such pursuit, were put upon the track of the person who had apparently committed the homicide.

W. C. York, owner of the dogs, testified, in substance, as follows: The dogs followed the trail from the body of the deceased down by a fence, across a field into a patch of woods, then out of the woods over a fence into a little woods road, which led to the hard-surfaced road going towards Broadway. *The dogs passed by the road which runs from near a filling station across the railroad in the direction of the defendant's home,* went down the railroad two or three miles, then left the railroad, circled back into the highway, and came to near the filling station where the road, previously crossed, branches off in the direction of defendant's home. No tracks could be seen here, but the dogs pulled to the right, crossed the railroad, came over a kind of hollow, branch or marsh, and stopped within twenty or thirty feet of William McLeod's house, where the defendant, his father and mother, and several small children were living. The dogs went no nearer; they saw the defendant when he came out of the house; they did not bay or indicate the defendant in any way.

Q. "If you were to carry your dogs up to within twenty or thirty feet of anybody's house, and they were to stop and lay down, what indication would that be to you that they had tracked any certain person?" A. "None whatever."

Q. "Then if there were more than one person in the house of William McLeod on the night these dogs stopped in twenty or thirty feet, there was no indication from your dogs that they had tracked any particular person?" A. "No, sir."

The prisoner moved to strike out the testimony of the witness York relative to the action of the bloodhounds. Overruled and exception.

The defendant was carried down the road from his house and requested to place his shoes in two or three different tracks. The statement was made by some one that the shoes did not fit the tracks; whereupon the defendant was allowed to go back home. He was later arrested and charged with the murder of the deceased.

Two other persons were arrested as suspects, one affected with a venereal disease, the other not, but the shoes of neither fitted the tracks in question; hence they were released.

Motion by the prisoner for judgment as in case of nonsuit. Overruled and exception.

Verdict: Guilty of murder in the first degree.

Sentence: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Young & Young for defendant.

STACY, C. J., after stating the case: The prisoner stressfully contends that his motion for judgment of nonsuit, made first at the close of the State's evidence and renewed at the close of all the evidence, should have been allowed, but we are of opinion that the case is one calling for a jury verdict. The motion to dismiss under C. S., 4643, requires that the court ascertain merely whether there is any evidence to sustain the allegations of the indictment, and not whether it be true or the jury should believe it. *S. v. Lawrence, post,* 562.

True, the evidence is circumstantial, but circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth. *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269.

Speaking to the subject in *S. v. White,* 89 N. C., 462, *Merrimon, J.,* delivering the opinion of the Court, said:

"It is well settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a *scintilla*—very slight evidence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty.

"A single isolated fact or circumstance might be no evidence, not even a *scintilla;* two, three or more, taken together, might not make evidence in the eye of the law, but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make *some evidence,* to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty," citing as authority for the position *Cobb v. Fogalman,* 23 N. C., 440; *S. v. Vinson,* 63 N. C., 335; *Wittkowsky v. Wasson,* 71 N. C., 451; *S. v. Massey,* 86 N. C., 658; *Imp. Co. v. Munson,* 14 Wall., 442; *Pleasants v. Fonts,* 22 Wall., 120.

Applying this principle to the present case, we think the incriminating evidence, taken in its totality, is sufficient to be submitted to the jury, but, of course, we express no opinion as to its weight. *S. v. Young,* 187 N. C., 698, 122 S. E., 667, and cases cited.

We are disposed to agree with the prisoner, however, in his insistence that the evidence of W. C. York, relative to the action of the bloodhounds, should have been excluded from the jury's consideration. *S. v. Norman,* 153 N. C., 591, 68 S. E., 917.

It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification. *S. v. McIver,* 176 N. C., 718, 96 S. E., 902; *S. v. Wiggins,* 171 N. C., 813, 89 S. E., 58; *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *S. v. Freeman,* 146 N. C., 615, 60 S. E., 986; *S. v. Hunter,* 143 N. C., 607, 56 S. E., 547; *S. v. Moore,* 129 N. C., 494, 39 S. E., 626.

The incompetency of the evidence in the instant case lies in the fact that the action of the bloodhounds was such as to afford no reasonable inference of the identity of the prisoner as the guilty party.

Nor can we safely say that this evidence is so palpably weak and uncertain as to render its admission harmless. There is no telling how far the prisoner's case was affected by it. "When there is error, its *immateriality* must clearly appear on the face of the record in order to warrant this Court in treating it as surplusage." *Pearson, C. J.,* in *McLenan v. Chisholm,* 64 N. C., 324.

For error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

BROGDEN, J., dissenting: In cases in which the State relies upon circumstantial evidence alone for conviction the facts established or produced at the trial must be of such nature and so related to each other as to point unerringly to the defendant's guilt and exclude every rational hypothesis of innocence. *S. v. Goodson,* 107 N. C., 798; *S. v. Wilcox,* 132 N. C., 1139; *S. v. Melton,* 187 N. C., 481. The incriminating evidence in the case at bar is vague, uncertain and inconclusive as to the vital fact of guilt. Therefore, they are insufficient, under the law, to warrant a verdict of guilty, and, in my judgment the trial judge should have nonsuited the case. *S. v. Montague,* 195 N. C., 20.

I. M. WELCH AND WIGGINS & AMMONS v. SUN UNDERWRITERS INSURANCE COMPANY.

(Filed 23 January, 1929.)

1. **Appeal and Error—Review—Harmless Error.**

   Where the verdict of the jury is that one of the plaintiffs recover nothing in his action, the defendant's assignment of error in the refusal of the trial court to grant a nonsuit in respect to him need not be considered on appeal.

2. **Insurance—Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent—Matters Relating to Property Insured.**

   Where the insured violates certain material stipulations and covenants contained in the policy of insurance, and there is a provision in the policy that such violation shall render it null and void, the insured is not entitled to recover thereon.

3. **Insurance—Rights of Parties Under Loss Payable Clause.**

A person, firm, or corporation named in an ordinary loss payable clause in a policy of fire insurance is merely an appointee with only the right to receive the whole or part of the money to which the insured is entitled, and where the insured may not recover on the policy by reason of his having violated certain stipulations and covenants therein, the persons named in the ordinary loss payable clause are not entitled to recover, and when these facts are established the insurer's motion as of nonsuit should be allowed. The distinction between the ordinary loss payable clause and the New York or New Jersey standard mortgage clause pointed out by CONNOR, J.

4. **Reformation of Instruments—Grounds For Remedy—Contracts.**

Reformation of an executed contract may be had only for mutual mistake, or for mistake on one side and fraud on the other.

5. **Insurance—Contract—Reformation—Fraud—Duty to Read Policy.**

The rule of law governing reformation of executed contracts applies to insurance policies, and where the evidence shows that the plaintiff accepted the policy of insurance as issued and that he was able to read and had full opportunity to read the policy, and the language of the policy is clear and unambiguous, he is not entitled to reformation of the policy for mistake and fraud.

6. **Insurance—Actions on Policies—Election of Remedies.**

Where the plaintiff sues on a policy of fire insurance he has made his election, and he may not thereafter seek reformation of the policy on the ground of mistake and fraud.

APPEAL by defendant from *Harwood, Special Judge,* at June Term, 1928, of GRAHAM. Reversed.

Action on a policy of insurance issued by defendant, on 4 August, 1924, insuring plaintiff, I. M. Welch, against loss or damage by fire on certain property described therein. The policy as issued contains a clause in words as follows:

"It is agreed that any loss or damage that may be ascertained, and proven to be due the assured under this policy shall be held payable to Wiggins & Ammons, Robbinsville, N. C., as their interest may appear, subject, nevertheless to all conditions of the policy."

The property covered by said policy was destroyed by fire on 15 November, 1924—before the expiration of the policy, according to its terms. At the date of said fire Wiggins & Ammons were creditors of I. M. Welch, holding a mortgage on the property destroyed by the fire, by which a part of their debt was secured; the remainder of said debt was in the form of a book account for goods and merchandise sold and delivered, and was not secured by mortgage or otherwise.

This action to recover on the policy for the loss sustained by plaintiff, resulting from the said fire, was begun on 23 June, 1925. The cause of action alleged in the original complaint, filed on 9 October, 1925, was founded on the policy as issued by defendant and accepted by plaintiffs. There was no allegation in said complaint that said policy was not in accordance with the application of plaintiffs for same.

Defendant denied liability on the policy, alleging that same had become null and void, according to its terms, by reason of the violation of certain stipulations and covenants contained therein. On 6 June, 1927, an amended complaint was filed by plaintiffs, with the leave of the court, containing allegations upon which plaintiffs prayed for a reformation of the policy, with respect to the clause contained therein, upon which plaintiffs, Wiggins & Ammons, rely for their right to maintain this action. In its answer to the amended complaint defendant denied the said allegations, and in addition to the defenses set up in its answer to the original complaint relied upon a provision in the policy in words as follows:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, unless the insured shall have complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire."

From judgment on the verdict that plaintiff, I. M. Welch, recover nothing, and that plaintiffs, Wiggins & Ammons, recover the sum of $642 of the defendant in this action, defendant appealed to the Supreme Court.

R. L. Phillips for plaintiffs.
R. R. Williams for defendant.

CONNOR, J. The plaintiff, I. M. Welch, has not appealed from the judgment rendered on the verdict at the trial of this action in the Superior Court. The jury found, in accordance with all the evidence, and under the instructions to which there were no exceptions, that he is not entitled to recover upon the policy on which this action was brought. Judgment was rendered accordingly that he recover nothing of the defendant in this action. All the evidence tended to show that after the issuance of the policy and before the fire which destroyed the property insured thereby, the said plaintiff violated certain stipulations and covenants contained in the policy. It is expressly provided therein that in the event of such violations, the policy should become null and void, and that defendant should not be liable thereunder. In view of the verdict and judgment, defendant's exception to the refusal of the court to allow its motion for judgment as of nonsuit, at the close of the evidence, as to the plaintiff, I. M. Welch, need not be considered on this appeal. At the date of the fire, to wit, 15 November, 1924, the policy was null and void as to the plaintiff, I. M. Welch, and defendant is not liable to him in any sum, by reason of the issuance of the policy. *Smith v. Insurance Co.,* 193 N. C., 446, 139 S. E., 310.

As defendant is not liable under the policy to plaintiff, I. M. Welch, the insured, it must follow that it is not liable to plaintiffs, Wiggins & Ammons, under the loss payable clause contained in the policy as issued by defendant and accepted by plaintiffs. This loss payable clause is not the New York or New Jersey standard mortgage clause, and defendant is not liable to plaintiffs, Wiggins & Ammons, under this clause, for the reason that they are simply appointees to whom any loss that may be due to the insured, is payable. As defendant is not liable to the insured under the policy, which has been rendered null and void as to him, it is not liable to Wiggins & Ammons. They cannot recover upon the policy as issued by defendant and accepted by the plaintiffs. *Roper v. Insurance Co.,* 161 N. C., 151, 76 S. E., 869. A person, firm or corporation named in an ordinary loss payable clause contained in a policy of fire insurance is merely an appointee, whose rights under the policy are not independent of the rights of the insured. Such appointee has merely the right to receive the whole or part of the money to which the insured is entitled. If for any reason the insured cannot recover on the policy, the appointee under the loss payable clause has no right of action against the insurer. *Everhart v. Ins. Co.,* 194 N. C., 494. The distinction between an ordinary loss payable clause, and the New York or New Jersey standard mortgage clause is well settled. *Bank v. Assurance Co.,* 188 N. C., 747, 125 S. E., 631; *Roper v. Insurance Co., supra.*

Plaintiffs, Wiggins & Ammons, evidently apprehending that the policy on which the action was brought, and as issued by defendant and accepted by them, would be declared null and void, as to the insured, and therefore as to them, because of the violation by the insured of its terms, on 6 June, 1927, by leave of court, filed an amended complaint, containing allegations upon which they prayed for a reformation of the policy, with respect to its provisions affecting their right to recover of defendant. Defendant's contention, that conceding that the allegations in the amended complaint were sufficient to support the prayer for the reformation of the policy, there was no evidence tending to show facts upon which the policy could be reformed by the court, in the exercise of its equitable jurisdiction, must be sustained. There was no evidence tending to show that the loss payable clause was attached to and made a part of the policy, instead of a New York or New Jersey standard mortgage clause, by reason of fraud on the part of the agent of defendant, or by reason of a mutual mistake of the parties. It is well settled that reformation of an executed contract may be had only for mutual mistake, or mistake on one side and fraud on the other. This principle is applicable to policies of insurance. *Britton v. Insurance Co.,* 165 N. C., 149, 80 S. E., 1072. In the opinion in that case, *Brown, J.,* says:

"But the reformation is subject to the same rules of law as applied to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other."

All the evidence upon the trial of this action showed that plaintiffs accepted the policy as issued by defendant; that they were able to read, and had full opportunity to read the policy, which was in their possession from the date of its issuance to the date of the fire. The language of the loss payable clause, contained in the policy, is clear and unambiguous. Plaintiffs, in their original complaint, founded their cause of action upon the policy as issued by defendant. They thereby elected to rely upon said policy for their recovery in this action.

There was error in the refusal of defendant's motion for judgment as of nonsuit, as against all the plaintiffs. Whether a new cause of action was alleged in the amended complaint, which could not be maintained because more than twelve months had elapsed from the date of the fire to the filing of the amended complaint, need not be decided upon this record. Upon all the evidence, plaintiffs were not entitled to the equitable remedy of reformation of the policy. Without a reformation, we think it clear that they cannot recover on the policy.

For error in the refusal of the motion for judgment as of nonsuit, at the close of all the evidence, the judgment is

Reversed.

C. TENNANT JOHNSON v. CITY OF ASHEVILLE, J. H. ALLPORT, DOING BUSINESS AS ALLPORT CONSTRUCTION COMPANY, AND PERRY M. ALEXANDER, INC.

(Filed 23 January, 1929.)

1. Torts—Joint Tort-Feasors—Right of Contribution.

Where one joint *tort-feasor* is only passively negligent, while the other is guilty of positive acts and actual negligence, directly causing the injury in suit, both are liable to the injured party, but the former is entitled to recover indemnity against the latter.

2. Same—Municipal Corporations—Issues.

Where a municipal corporation makes a contract for municipal construction, and the party contracting to do the work makes an agreement with a third party to do the work, and in the course of construction the plaintiff's property is negligently damaged by blasting: *Held,* all three

> parties are joint *tort-feasors* and liable to the injured person, but the municipal corporation is entitled to have the issue, tendered by it, of primary and secondary liability as between it and the original contractor considered and determined according to law.

CIVIL ACTION, before *Sink, Special Judge,* at March Term, 1928, of BUNCOMBE.

The evidence tended to show that on or about 23 September, 1926, the defendant, Allport Construction Company, made an offer to the City of Asheville to do the excavation for the new McCormick football stadium at certain unit prices therein specified. Thereafter, on 27 September, 1926, the City of Asheville, through its mayor, accepted the offer of Allport Construction Company in the following language: "This is to confirm the contract with you and accept your offer at the above price." Thereafter, Allport Construction Company made an agreement with Perry M. Alexander to do the work called for in the contract. Alexander proceeded with the work, and in the performance thereof heavy blasting became necessary. On or about 22 October, 1926, a heavy blast was set off, and plaintiff testified: "As I got to the door the blast went off and knocked the windows out of this bedroom and glass practically all over the room. . . . It felt like the house was going to crumble and fall down on me. I think if I could have prayed I would have prayed right then. . . . The blast knocked out the windows in the bedroom and did a great deal of damage to the room and the gutters. There were blasts set off after that time. . . . The next blast which did real damage was on or about 25 January, 1927. The whole heavens there was just as black as could be, and there was an awful roar, of course, and when I looked around I saw this condition of my house. It just almost demolished it. It practically tore it all to pieces. At the end of the house here there is a big hole sunk right there in the brick. . . . There were big holes in the roof of the house. It had to be practically recovered."

The evidence further tended to show that all estimates were made payable to the Allport Construction Company. The city had an engineer upon the work to see that it was properly done. The football stadium was being constructed for the City of Asheville. There was further evidence from Mr. George Pennell that the defendant, Allport, trading as Allport Construction Company, had stated to him, "Mr. Alexander is not a subcontractor, . . . and he had just been employed by me to do this work at a contract price." There was other evidence to the same effect upon this point.

The following issues were submitted:

"1. Was plaintiff's property damaged by blasting negligently conducted, as alleged in the complaint?

2. What damage, if any, did the plaintiff sustain because of said blasting, as alleged in the complaint?

3. Was the said work by its nature inherently dangerous?

4. Was Perry M. Alexander an independent contractor, as alleged?

5. Was the defendant Alexander in charge of the work at the time of the injury?

6. From which of the defendants is the plaintiff entitled to recover the said damages?

7. Between the defendants, Perry M. Alexander and J. Hobart Allport and City of Asheville, is the defendant Perry M. Alexander primarily liable and the other defendants secondarily liable?"

The record shows the following: "During the progress of the trial, it was agreed by all the parties, plaintiff and defendants, that the jury should answer the first issue "yes," and the second issue $4,200, and that the jury need not answer the other issues, but that the court should hear all the facts and evidence, and answer issues 3, 4, 5, 6 and 7, and that the answer so made by the court, together with the answer to issues 1 and 2, should constitute the verdict in this cause. This agreement and consent were made subject to any and all exceptions and objections made by the parties as to evidence, the refusal and special instructions requested, and the refusal of the court to adopt and submit issues tendered by the parties, or any of them; and generally any and all exceptions to which each or any party might be entitled in a regular jury trial. The court answered the third issue "yes"; the fourth issue "yes"; the fifth issue "yes"; the sixth issue "all three"; the seventh issue "yes."

Thereupon, judgment was signed in favor of the plaintiff. Said judgment contained the following clause: "It is further ordered and adjudged that, as between the defendants in this cause, the defendant, Perry M. Alexander, is primarily liable for the amount of said judgment, and that the defendants, J. Hobart Allport, and the City of Asheville, are secondarily liable therefor; and that the said defendant, J. Hobart Allport and the City of Asheville have and recover of the said Perry M. Alexander such amount of said judgment as the said defendants, J. Hobart Allport, and the City of Asheville, or either of them, may be required to pay of the said judgment."

The defendant, City of Asheville, tendered the following issue: "Between the defendants, City of Asheville, and J. H. Allport, is the defendant, J. H. Allport, liable, and the defendant, City of Asheville, secondarily liable?"

The trial judge declined to consider this issue.

The City of Asheville perfected its appeal, and the other defendants did not.

Wells, Blackstock & Taylor for plaintiff.
Mark W. Brown for defendant.
George Pennell and R. R. Williams for City of Asheville.

Brogden, J. Under what circumstances may one joint *tort-feasor* recover indemnity from another joint *tort-feasor?*

The identical question is discussed in the case of *Taylor v. Construction Co.,* 195 N. C., 30, 141 S. E., 492. The principle of liability was thus declared: "Where one of them is only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both are equally liable to the injured person. . . . The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury." *Gregg v. Wilmington,* 155 N. C., 18, 70 S. E., 1070; *Commissioners v. Indemnity Co.,* 155 N. C., 219, 71 S. E., 214; *Doles v. R. R.,* 160 N. C., 318, 75 S. E., 722; *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502.

The principles of liability declared in the cases mentioned, entitled the City of Asheville to have the issue tendered by it considered and determined according to law.

Partial new trial.

W. L. McCOY v. J. B. JUSTICE, Administrator, et al.

(Filed 23 January, 1929.)

Pleadings—Demurrer—Cause of Action—Criminal Conspiracy—Perjury.

Where the complaint contains allegations of criminal conspiracy, fraud, subornation of witnesses, suppression of evidence, and jury attaint, the cause of action stated is more than the procurement of a verdict by means of false testimony or the subornation of perjury, and the action should not be dismissed because the complaint failed to allege that the witness, upon whose testimony the verdict in question was rendered, has been convicted of perjury or that the falsity of the evidence has been established by writing or unimpeachable record, and a demurrer thereto on the ground that a cause of action is not stated is bad.

Appeal by plaintiff from *Sink, Special Judge,* at September Special Term, 1928, of Macon.

Civil action to vacate judgment and to restrain its enforcement or to stop levy of execution.

A demurrer *ore tenus* was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them.

The material allegations of the complaint, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. That on 28 June, 1926, Perry Hyatt, now deceased, instituted a civil action for damages in the Superior Court of Macon County against the plaintiff in the present suit, alleging *crim. con.* and alienation of his wife's affections, which said action was successfully prosecuted to judgment and affirmed on appeal. *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807.

2. That said action was brought as the result of a criminal conspiracy on the part of Perry Hyatt and the defendants in the instant case, other than Caroline Hyatt and C. L. Ingram, the gravamen of the complaint being that said defendants wrongfully, unlawfully and corruptly formed a conspiracy to cheat, defraud and swindle the plaintiff by entering into fraudulent and collusive agreements among themselves, and especially between the said Perry Hyatt, now deceased, and his wife, Anna Hyatt, who by creating false and feigned situations—pretending to be estranged, living separate and apart in appearance only, were able to use the courts as an instrument of their own schemes and deceitful purposes, by suppressing and withholding the truth and by the use of false, perjured and manufactured testimony.

3. That in order to carry out said unlawful conspiracy, it was agreed by and between Perry Hyatt and his wife that they would ostensibly live separate and apart—when in reality no actual separation existed—until each could bring a suit against W. L. McCoy—one on the part of the husband for *crim. con.,* etc., and the other by the wife for seduction and debauchery, the latter being dismissed and affirmed on appeal. *Hyatt v. McCoy,* 194 N. C., 25, 138 S. E., 405.

4. That Perry Hyatt and Anna Hyatt were the principal witnesses at the trial above mentioned and falsely testified to the allegations of the complaint, knowing full well that they were not true.

5. That in carrying out said false and fraudulent scheme and conspiracy, the said Perry Hyatt and wife, Anna Hyatt, were aided, assisted and abetted by the other defendants, save and except Caroline Hyatt and C. L. Ingram.

6. That at the trial of said cause some of the defendants, brothers of the said Perry Hyatt, so threatened and terrorized three or four of the defendant's witnesses as to cause them to absent themselves from the court.

7. That some of the defendants talked with a number of prospective jurors and arranged with them to render a verdict in favor of Perry Hyatt, and caused and procured certain of the jurors, so tampered with and debauched, to be chosen as jurors at the trial.

8. That in consequence of said conspiracy and unlawful conduct on the part of the defendants, other than Caroline Hyatt and C. L. Ingram, a verdict was rendered in said action against W. L. McCoy in the total sum of $12,000.

From a judgment sustaining the demurrer and dismissing the action—counsel agreeing that no execution should be issued on the judgment assailed until the matter could be heard on appeal—the plaintiff appeals, assigning error.

Moody & Moody and Edwards & Leatherwood for plaintiff.
Bryson & Bryson and Geo. H. Patton for defendants.

Stacy, C. J., after stating the case: The demurrer was sustained and the action dismissed because it is not alleged that the witness, upon whose testimony the verdict in question was rendered, has been convicted of perjury, or that the falsity of the evidence has been established by writing or unimpeachable record, and the decision in *Kinsland v. Adams,* 172 N. C., 765, 90 S. E., 899, is cited as authority for the position, as well as *Moore v. Gulley,* 144 N. C., 81, 56 S. E., 681.

The complaint, as we understand it, alleges much more than the procurement of a verdict by means of false testimony or the subornation of perjury. It contains allegations of criminal conspiracy, fraud, subornation of witnesses, suppression of evidence, and jury attaint. This brings the case within the doctrine announced in *Stockton v. Briggs,* 58 N. C., 314, to the effect, that "If a party obtains a judgment at law by fraud, as by subornation of perjury, or the like foul means, equity will give relief—not by taking possession of the case, going into the trial of legal rights and granting a perpetual injunction, but by acting in aid of the common law and decreeing that the party shall consent to set the judgment and verdict aside and have a new trial at law, and in the meantime, as ancillary to this relief, an injunction will be granted." To like effect are the decisions in *Peagram v. King,* 9 N. C., 295 and 605; *Burgess v. Lovengood,* 55 N. C., 457, and *Scales v. Trust Co.,* 195 N. C., 772, 143 S. E., 868.

We are not now concerned with the admissibility of evidence or the question as to whether the plaintiff can make good his allegations by competent proof, but, deeming the facts set out in the complaint to be true, the accepted rule when the sufficiency of a pleading is challenged by demurrer, we think a cause of action has been stated.

Reversed.

J. E. HONEYCUTT, ADMINISTRATOR OF THE ESTATE OF JOSEPH H. OVERBY, DECEASED, v. CHEROKEE BRICK COMPANY.

(Filed 23 January, 1929.)

Master and Servant—Liability of Master for Injuries to Servant—Photographs as Evidence of Master's Negligence.

The admission of photographs of the machine upon which it is alleged the plaintiff's intestate was killed, should be confined for the purpose of allowing witnesses to explain their testimony in respect thereto, and the admission of such photographs as substantive evidence of the master's failure to supply his servant safe tools and appliances is reversible error.

CIVIL ACTION, before *Harding, J.*, at May Special Term, 1928, of MECKLENBURG.

The plaintiff is the duly qualified administrator of the estate of Jos. H. Overby.

The evidence tended to show that Jos. H. Overby was employed by the defendant at its brick plant as a brick burner, and that in the line of his duty he operated the brick machine. "When working at the mill he would either pull the clay up in the mill at this particular machine or run what they call the mud machine. The man who operated this particular machine would oil it when operating it. Whoever operated it kept it oiled. On the day of his death Jos. H. Overby was found in the gear wheels of the mud machine. His clothes were torn practically all off and he was practically torn in two. . . . There was no guard over the gear at the time. One could have been placed over it."

There was no evidence tending to show how plaintiff's intestate was killed, but the plaintiff introduced in evidence paragraph (a) of the further answer and defense, which is as follows: "That deceased was so injured as a result of his oiling or undertaking to oil certain of the machinery in defendant's plant, and while the same was in motion."

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff.

The jury awarded damages in the sum of $20,000.

From judgment upon the verdict the defendant appealed.

Plummer Stewart for Hamilton C. Jones (James A. Lockhart Estate), for plaintiff.

Robert Ruark, Ruark & Fletcher, J. W. Bailey and J. F. Flowers for defendant.

BROGDEN, J. Certain photographs of the machine, upon which it was alleged the deceased was killed, and the surroundings and attachments thereof were offered in evidence. There was evidence tending to show that these photographs correctly represented the machine and the surroundings, and they were received in evidence generally and as substantive evidence, over the objection of defendant.

The courts are not in accord upon the question of the admissibility of photographs. In this State photographs, taken two years or more after an injury, and where there was evidence of changes in the situation, were held inadmissible either as substantive evidence or otherwise. *Hampton v. R. R.,* 120 N. C., 534, 27 S. E., 96.

Thereafter, in *Pickett v. R. R.,* 153 N. C., 149, 69 S. E., 8, the rule with respect to the competency of photographs was thus expressed by *Walker, J.:* "The court, over defendant's objection, permitted these photographs to be used for the purpose of enabling a witness to explain his testimony as to what effect the diversion of the water had upon the land. Preliminary proof was heard as to the correctness of the photographs and as to the time and manner in which they were made. There was no error in admitting them for the purpose indicated."

Again, in *S. v. Jones,* 175 N. C., 709, 95 S. E., 576, the Court said: "The exceptions as to the use of the photograph for the purpose of allowing one of the witnesses to illustrate or explain his testimony is not well taken. The witness was endeavoring to show how the parts of the distillery which were found in the house might be assembled so as to make a complete apparatus for manufacturing liquor. He could use a diagram for the purpose, and why not a photograph? The trial judge excluded it for any other purpose, and distinctly charged the jury to disregard it, except for the indicated purpose and not to use it as substantive testimony."

In *Elliott v. Power Co.,* 190 N. C., 62, 128 S. E., 730, *Varser, J.,* writing the opinion, said: "All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled in explaining the testimony. The charge shows plainly that the court was careful to apply this rule to use of the pictures offered by either side, and when the charge is considered contextually, it appears the court was cautioning the jury not to consider pictures not in evidence."

The principles announced in the foregoing decisions have been consistently recognized and applied. *Hoyle v. Hickory,* 167 N. C., 619, 83 S. E., 738; *S. v. Kee,* 186 N. C., 473, 119 S. E., 893; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743; *Kepley v. Kirk,* 191 N. C., 690, 132 S. E., 788.

Applying the rules established by our decisions, we conclude, and so hold that the admission of the photographs as substantive evidence constituted error.

New trial.

W. R. SMITH AND G. W. AILEY v. F. E. COOK AND J. A. COOK.

(Filed 23 January, 1929.)

1. **Pleadings—Issues, Proof, and Variance—Variance Between Allegations and Proof—Nonsuit.**

   A complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory, and where the allegations of the complaint state one cause of action and the evidence is to matters not alleged, and on another cause of action, a judgment as of nonsuit is properly granted.

2. **Replevin — Pleading and Evidence — Burden of Proof — Claim and Delivery.**

   In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. C. S., 831.

CIVIL ACTION, before *MacRae, Special Judge,* at Special July Term, 1928, of GRAHAM.

Plaintiffs instituted claim and delivery proceedings against the defendants for the possession of certain lumber "on a yard in Graham County, known as the Ben Stewart yard, under and by virtue of agreement made between F. E. Cook and W. R. Smith on 8 June, 1927, under which said agreement the said W. R. Smith paid in full for the said lumber and is now the owner of same."

It was further alleged that the plaintiff, Ailey, purchased an interest in said lumber from his coplaintiff, W. R. Smith. The contract of 8 June, 1927, specifically alleged as a basis of plaintiff's ownership, is set out in the record. The terms of said contract are to the effect that the plaintiff, W. R. Smith, agrees to purchase all the lumber that F. E. Cook "has manufactured at present" on the Ben Stewart yard or on the railroad. The contract further contains certain specifications of lumber to be cut, together with conditions as to the time of payment. The agreement contains this clause: "This contract is for all the lumber cut by Cook on West Buffalo Creek during the year 1927."

At the conclusion of the evidence the trial judge sustained the motion of nonsuit made by the defendants, and the plaintiffs appealed.

R. L. Phillips for plaintiffs.
J. N. Moody and T. J. Jenkins for defendants.

BROGDEN, J. The plaintiffs base their cause of action upon a specific contract specifically set out in the affidavit, which was treated as a complaint. Ordinarily, in the absence of a request to amend a pleading to conform to the proof, a party is restricted to the cause of action alleged in the pleading. The contract of 8 June expressly provides that it was to cover only such lumber as was cut by the defendant, F. E. Cook, during the year 1927. There was no evidence on behalf of plaintiffs that the lumber seized by the sheriff was so cut during said period. Plaintiff, Smith, testified that he left about December, 1927, and there was thirty or forty thousand feet of lumber on the yard, but on cross-examination plaintiff testified, "I don't know when this lumber was cut." The burden was upon the plaintiffs to establish a cause of action in accordance with C. S., 831. Plaintiffs, however, introduced a mortgage made by the defendant, F. E. Cook, to Graham County Supply Company, which covered about fifty thousand feet of lumber and attempted to prove ownership by said mortgage, but the mortgage was not mentioned in the complaint, and no cause of action thereon was alleged. A complaint proceeding upon one theory will not authorize a recovery upon another entirely distinct and independent theory. *Moss v. R. R.,* 122 N. C., 892, 29 S. E., 377; *McCoy v. R. R.,* 142 N. C., 387, 55 S. E., 283; *Green v. Biggs,* 167 N. C., 417, 83 S. E., 553; *Sultan v. R. R.,* 176 N. C., 136, 96 S. E., 897.

Affirmed.

CAMEL CITY COACH COMPANY v. JOHN GRIFFIN.

(Filed 23 January, 1929.)

Appeal and Error—Review—Interlocutory, Collateral, and Supplementary Proceedings and Questions—Injunctions.

Where in an action for permanent injunction a temporary restraining order is issued upon motion of plaintiff, and at the hearing the evidence of plaintiff and defendant is contradictory, and an order continuing the restraining order to final hearing is made without findings of fact by the court or a request therefor by defendant, it is presumed that the court found the facts to be as alleged in the complaint upon the supporting evidence, at least prima facie, and the order of continuance will be affirmed.

APPEAL by defendant from judgment of *Lyon, Emergency Judge,* at September Term, 1928, of FORSYTH. Affirmed.

Action for permanent injunction, perpetually restraining defendant from operating on the State highway between the town of Rural Hall and the city of Winston-Salem an automobile for the transportation of passengers, for compensation, and for other relief.

The action was begun in the county court of Forsyth County. From order continuing a temporary restraining order to the final hearing, defendant appealed to the judge of the Superior Court of said county.

From judgment affirming the order of the county court, defendant appealed to the Supreme Court.

Ratcliff, Hudson & Ferrell for plaintiff.
McMichael & McMichael for defendant.

CONNOR, J. There has been no final judgment determining the rights of the parties upon the matters involved in the controversy out of which this action arises. Issues of fact arising upon the pleadings have not been tried. A temporary restraining order, in accordance with the motion of plaintiff, supported by affidavits, has been continued to the final hearing by an order of the county court. The action has been heard in this Court upon defendant's appeal from a judgment of the Superior Court, affirming the order of the county court. Defendant excepted to the judgment and assigns same as error.

Plaintiff alleges in its complaint that it has an exclusive franchise issued by the Corporation Commission, under the provisions of chapter 136, Public Laws 1927, to operate a bus on the State highway from Rural Hall to Winston-Salem, for the transportation of passengers, for hire. This allegation is denied by defendant in his answer.

Plaintiff further alleges in its complaint that defendant is engaged in the business of operating an automobile on said highway, between Rural Hall and Winston-Salem, for the transportation of passengers, for hire, without a franchise from the State, and in unlawful competition with plaintiff. This allegation is denied by defendant in his answer.

There was a sharp and serious conflict in the evidence offered by plaintiff and defendant, at the hearing, upon the issues of fact thus raised by the pleadings. No findings of fact were made by the county court or by the judge of the Superior Court, in support of the order of continuance, or of the judgment affirming said order. The record shows no request by defendant that such findings be made and set out in the judgment or in the record. As there was evidence tending to support the allegations of the complaint, there is a presumption that the court found the facts to be as alleged in the complaint, at least prima facie. There was therefore no error in the judgment affirming the order of continuance, or in the said order.

The temporary restraining order was properly continued to the hearing, when and where the issues of fact may be determined. *Cobb v. R. R.*, 172 N. C., 58, 89 S. E., 807. However the facts may be found at the final hearing, there are serious questions of law presented by the record. We refrain from discussing these questions of law until the facts have been found by a jury or otherwise, and until they are duly presented to this Court for decision. For the disposition of this appeal, it is sufficient to say that we find no error in the judgment. It is

Affirmed.

R. D. CRAVER AND THE GUARANTY MORTGAGE COMPANY v. W. B. SORRELL AND WIFE, ELIZABETH SORRELL, AND THE PIEDMONT THEATRES, INC. (NOW PUBLIX-SAENGER THEATRES OF NORTH CAROLINA, INCORPORATED).

(Filed 23 January, 1929.)

Landlord and Tenant—Leases—Rights of Parties Under Conflicting Leases of Same Property.

Where the landlord leases his property to another and thereafter makes a contract with a real estate agency whereby it was authorized to obtain a lessee for the same property, and the real estate agency secures a lessee and makes a lease contract with him according to its authority, and both the real estate agency and the subsequent lessee, the plaintiffs, had knowledge of the prior lease, but were of the opinion it was void, and the prior lease was registered and is valid, and there is no evidence of a conspiracy to deprive the plaintiffs of their rights under the contracts: *Held*, the second lease was made subject to the first, and there was no breach of the contract with the real estate agency or its contract with the subsequent lessee, and neither of them is entitled to damages or to specific performance.

APPEAL by plaintiffs from *Small, J.*, at May Term, 1928, of ORANGE. Affirmed.

Action for specific performance of contract, in writing, for lease of a moving picture theatre, or for damages for breach of said contract, and for other relief.

From judgment dismissing the action, as upon nonsuit, upon motion of defendants, at the close of the evidence for plaintiffs, plaintiffs appealed to the Supreme Court.

Gattis & Gattis for plaintiffs.
J. A. Giles and McLendon & Hedrick for defendants, Sorrell and wife.
Alfred S. Wylie for defendant, Theatres, Inc.

CONNOR, J. Defendants, W. B. Sorrell and wife, on 16 March, 1927, executed a paper-writing by which they authorized and empowered the plaintiff, the Guaranty Mortgage Company, as their representative, to procure for them a lessee of a moving picture theatre, which they proposed to erect on a lot of land, situate in Chapel Hill, N. C., and owned by the said W. B. Sorrell. The said paper-writing was duly recorded on 16 March, 1927. The Guaranty Mortgage Company had notice, at the date of the execution of said paper-writing, that said Sorrell and wife had prior thereto executed a lease of said theatre to the defendant, the Piedmont Theatres, Inc. The said lease was dated 15 September, 1926, and was duly recorded on 8 April, 1927. Thereafter, on 13 April, 1927, within the time stipulated, the said Guaranty Mortgage Company, as representative of Sorrell and wife, made a contract with plaintiff, R. D. Craver, by which the said Craver agreed to lease the said theatre, in accordance with the terms upon which the Guaranty Mortgage Company was authorized and empowered to procure a lessee of said theatre. At the date of said contract R. D. Craver had notice of the prior lease made by Sorrell and wife to the Piedmont Theatres, Inc.

Both the plaintiffs were of the opinion that the prior lease to the Piedmont Theatres, Inc., was void.

The said lease, however, is valid and the Piedmont Theatres, Inc., now the Publix-Saenger Theatres of North Carolina, Inc., has entered into possession of the theatre, which has been erected on the lot owned by W. B. Sorrell, and holds the same under the said lease. There was no evidence tending to show that defendants had entered into a conspiracy to deprive the plaintiffs of their rights under the contracts upon which this action is founded, as alleged in the complaint. All the evidence is to the effect that the Publix-Saenger Theatres of North Carolina, Inc., entered into possession of said threatre as successor of the Piedmont Theatres, Inc., under the lease dated 15 September, 1926, and recorded 8 April, 1927, and holds the same by virtue of said lease.

There was no error in the judgment dismissing the action, at the close of plaintiff's evidence. Both plaintiffs entered into the contracts upon which this action is founded with full notice of the prior rights of defendant, the Piedmont Theatres, Inc. They are, therefore, not entitled to a decree of specific performance of said contracts; nor are they or either of them entitled to damages for breach of said contracts. Their rights were acquired subject to the lease executed by W. B. Sorrell and wife to the Piedmont Theatres, Inc. There has been no breach of the contract made by the said Sorrell and wife, with plaintiff, the Guaranty Mortgage Company, or of the contract made by said Mortgage Company, as their representative, with plaintiff, R. D. Craver. Both contracts were made subject to the prior lease, and with full knowledge of its existence. The judgment is

Affirmed.

STATE v. W. H. LAWRENCE.

(Filed 23 January, 1929.)

1. Criminal Law—Trial—Nonsuit—Evidence.

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. C. S., 4643.

2. **Same—Province of Court and Jury In General.**

The competency, admissibility and sufficiency of evidence is for the court to determine; the weight, effect and credibility is for the jury.

3. **Criminal Law—Evidence—Circumstantial Evidence.**

Circumstantial evidence sufficient for conviction should be clear, convincing and conclusive, showing facts, relations, connections and combinations between the circumstances that are natural, clear, reasonable and satisfactory, excluding all reasonable doubt of guilt and every reasonable conclusion of innocence.

4. **Same—Evidence of Identification.**

Testimony that a person who looked like the defendant was seen in the vicinity of the crime is competent and admissible to establish the identity of the defendant when taken in connection with other evidence of guilt.

5. **Criminal Law—Evidence—Attempted Suicide as Evidence of Guilt.**

Evidence of an attempt by the defendant to commit suicide while on trial for murder is competent, taken in connection with other circumstances, to be considered by the jury upon the question of defendant's guilt.

6. **Homicide—Evidence—Weight and Sufficiency—Nonsuit.**

Evidence tending to show that the deceased was struck about the head with a weapon and thrown into a river, that the defendant had a motive for the crime, and that his automobile had blood spots on it at a place where a passenger therein bleeding from the head would leave blood spots, with evidence that an automobile similar to that of the defendant in which was a man who looked like the defendant was seen on the bridge from which the crime was committed and in the vicinity of the crime at about the time of its commission, that the automobile seen on the bridge made tracks at either end similar to the tread of the tires on the defendant's car, that when the defendant was asked about the crime he was nervous and made contradictory statements as to his knowledge of and relations with the deceased; that during the trial the defendant attempted suicide, together with other evidence of motive and identity: *Held*, the circumstantial evidence of defendant's guilt was sufficient to be submitted to the jury and to sustain their verdict thereon of murder in the second degree.

BROGDEN, J., dissenting.

APPEAL by defendant from *Nunn, J.*, and a jury, at May Term, 1928, of CHATHAM. No error.

This defendant was indicted for murder in the first degree of Mrs. Annie Terry. He was convicted of murder in the second degree. The judgment of the court below was that the defendant be confined in the State's prison for a term of thirty years. The material evidence will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Fuller, Reade & Fuller, Long & Bell, Pou & Pou and J. L. Emanuel for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence, moved to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below denied the motions. This constitutes defendant's sole exceptions and assignments of error. The only question involved in this appeal: Was there sufficient evidence of defendant's guilt to be submitted to the jury? We think so.

On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. "An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt." *S. v. Earp, ante,* at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899. The evidence in the case was circumstantial.

In *S. v. Plyler,* 153 N. C., at p. 636, this Court approved the charge of the court below, which was as follows: "The law says that circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth; and it is essential and when properly understood and applied is highly satisfactory in matters of the gravest moment. The facts, relations, connections and combinations between the circumstances should be natural, clear, reasonable and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing and conclusive in all its combinations and should exclude all reasonable doubt as to guilt. In passing upon such evidence, it is the duty of the jury to consider all circumstances relied upon to convict and to determine whether they have been established beyond a reasonable doubt. If not so established, the circumstances should be excluded from further consideration and have no weight in reaching a verdict. The State puts up a witness here and undertakes to prove a circumstance; you will first determine in your mind, is this circumstance established beyond a reasonable doubt? If you say that circumstance has been established beyond a reasonable doubt, you take that into consideration in determining what verdict you will find. After considering the evidence in this way, and determining the circumstances which are established beyond a reasonable doubt, the next thing for the jury to determine is, do these circumstances exclude every other reasonable conclusion except that of guilt? If so, the evidence is sufficient to convict; otherwise, not."

This Court, in approving the above charge, which was made by Judge Wm. R. Allen in the court below, afterwards a member of this Court, made this observation: "Give it our approval as a lucid statement of the law." *S. v. Brackville,* 106 N. C., 701 (710); *S. v. Austin,* 129 N. C., 534; *S. v. Flemming,* 130 N. C., 688; *S. v. Wilcox,* 132 N. C., at p. 1137-38; *S. v. Willoughby,* 180 N. C., 676; *S. v. Blackwelder, supra; S. v. Sigmon, supra.*

In an analysis of the evidence, let us consider:

(1) *The corpus delicti—the body of a crime.* In the present case, there is no question as to the *corpus delicti.* On 24 March, 1928, some men were fishing in the Cape Fear River above Avent's Ferry Bridge. D. F. Osborne, a witness for the State, testified that about 11 o'clock at night he heard an automobile approaching the bridge from the Chatham County side. "I heard a woman's voice screaming, 'Don't kill me; please don't kill me,' two or three times. Then for a few minutes the cries closed, and I heard the sound of a large splash or some large object fell into the river, and in a minute or two somebody struggling in the water and crying out, 'Save me,' 'Lord have mercy, save me.' 'Help! Help!' We got Mr. Harrington (a deputy sheriff), also his brother, and got back to the bridge around 1 o'clock, maybe 1:30. I heard the same woman's voice, but much weaker, calling for help from down the river below the bridge. Sounded like it was three or four hundred yards down the river. Mr. Harrington and Dickens got in a boat and went down the river toward it, but it ceased before they got there."

Mrs. Mary Yandel, a daughter of Mrs. Annie Terry, on 3 April, 1928, identified the body of her mother down the river about three miles from the bridge. "She had bruises on her face and head."

(2) *The motive.* "It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State, as in this case, has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime." *S. v. Green,* 92 N. C., at p. 782; *S. v. Stratford,* 149 N. C., 483; *S. v. Wilkins,* 158 N. C., 603.

Fifteen letters were introduced in evidence from defendant to Mrs. Annie Terry, all signed "Rover." Mrs. Terry had been a widow for some fifteen years before she was killed. She and defendant lived in Durham—defendant in the same apartment in which his niece and her husband lived, but was a contractor and the letters indicated was away mostly at work. A great number of the letters were in reference to Saturday night engagements. One requested her to come to Salisbury Sunday night to see him. A number of letters mentioned that he would phone her. Two of the letters mentioned that when he got there Saturday night he would phone her about 7 o'clock, and one that they would go for a ride; one, "I think my people are going to be out of town, and if they are we can make things all O. K." One of the letters in which he wishes her to "come part of the way back with me Sunday evening and go back Monday morning," had written below *"Burn this."* One letter, of 27 September, 1927, said: "I don't see what you keep on about women for, as I have not hardly spoken to a girl since I have been here. I have tried to be good to you, and told you the truth on all occasions, and I can't see to save my life what pleasure you get out of trying to make my life so unpleasant for me. If there was any reason for it, it would be different. But it certainly does hurt me to get such a letter with no cause." Another letter says: "This is another case of where you let your imagination run away with you, and I am getting tired of getting such letters, when there has never been any cause for one, and it looks like to me that you could realize that some time." A letter which seems to have been written in December, 1927, says: "Now if you let him know anything, it will mean that I will have to leave this country, for he has not got any sense about such things, and I think it will be to your benefit to think before you say too much."

The letters indicated an illicit relationship. Mrs. Annie Terry kept these letters. Defendant, from the letters, knew he was dealing with a woman he could not trifle with. The defendant and Mrs. Annie Terry were passed middle age, and it was in evidence that defendant said to one W. B. Cheek, in a conversation about 1 March, that he was going to get married. It was in evidence that he told Sheriff G. W. Blair he was going to get married. "He gave me the lady's name and address at Cooleemee; that he finished the letter about 9 p.m.; that he didn't want the lady's name in it; that he was engaged to her." He wrote her the night of 24 March. The defendant's motive was to get rid of this "old glove" and marry the Cooleemee fiancee.

(3) *Identity of defendant as the one who committed the crime, and contradictory statements.* The Lawrence home place, owned by defendant's father, who is dead, and now owned by the heirs, is located about a mile and a half east of Avent's Ferry Bridge, and the heirs own

the land on the Chatham County side of the river to the bridge. The water in the river where Mrs. Annie Terry was thrown in is some 18 to 20 feet deep. Defendant was raised at the old Lawrence home place. The State contends that it is reasonable to infer that defendant in his boyhood days hunted along the river bottom and fished and boated in the river; knew its depth and was familiar with the surroundings. The piers and bridge were finished the fall previous. Defendant was at Brick Haven, some two miles away, two or three weeks before the murder; he was familiar with the bridge and surroundings.

Two fishermen were some 300 or 400 yards above the bridge. One of the fishermen, D. F. Osborne, testified that the car Mrs. Annie Terry was in before she was thrown into the river came on the bridge from the Chatham County side. This was about 11 o'clock on the night of 24 March. "I heard a woman's voice screaming, 'Don't kill me; please don't kill me,' two or three times. Then for a few minutes the cries closed, and I heard the sound of a large splash or some large object fell into the river, and in a minute or two somebody struggling in the water and crying out, 'Save me,' 'Lord, have mercy, save me.' 'Help! Help!' Heard this cry several times. Soon after the body struck the water the car moved on across the bridge to the Lee County side, and as it was going off the bridge the screams and cries seemed louder and more pitiful than ever, and the car turned around and came back up on the bridge. As it drove across I heard a heavy voice talking to some one in the water, but could not distinguish what was said. The car didn't stop, but moved across to the Chatham County side, turned around and drove on the bridge again, and stopped, turning out the lights. It was a smooth-running, gear shift car, and sounded like it was new." The fishermen went after Deputy Sheriff Henry Harrington and another, and returned in about an hour and a half. Harrington got a boat and he and another went down the river. A voice was heard "kind of in distress"; "after the voice hushed." Harrington testified: "I saw and examined the road there at the Lee County end of the bridge and the Chatham County end of the bridge. I saw some automobile tracks at those places; *they were still distinct and well marked—pretty plain.* The ground there at that time was *just soft enough for a car to make a good print—make a good plain print.* I noticed it on both sides of the river after they said the car turned around on both sides. I went to both sides and looked down there and found some prints on both sides of the river. . . . I have seen the automobile that Sheriff Blair has in his possession—a Nash coupe—green coupe. I have examined the tires on that car. I have not observed the tracks made by those tires; I just saw the car sitting in the garage and observed the casing. *I would say that the* *marks on the casing of that car were the same as the marks and tracks I saw on the bridge—Firestone tread.*"

There were blood spots on the third or fourth span of the bridge as big as a man's hand, and a little bit of blood on the inside and outside of the railing. It looked like fresh blood and strands of hair in the big spot of blood.

Charlie Goodwin testified: "On the night of 24 March, 1928, my wife and I, who had been to Sanford, N. C., were returning to our home, which is about two and one-half miles or three miles from Avent's Ferry Bridge, in Chatham County, N. C. We crossed the bridge at 11 o'clock, because it was eleven minutes past 11 when we got home, and I estimate that it took about eleven minutes to drive that distance. As we approached the bridge from the Lee County side I saw an automobile on the bridge with its lights burning, but as we got nearer the lights were turned out. *It was a green, one-seated car with wire wheels.* The wheels were not the same color of the car, but I do not know what color they were. I did not see who was in the automobile. My wife was on the front seat, but I was nearer the other automobile than she. My wife told me there was a man in the car, and as we passed he turned his head toward her; *that he was a stout, broad-faced man.* I have seen the automobile which is in the possession of Sheriff Blair and which belongs to the defendant, and *it looks like the one I saw on Avent's Ferry Bridge that night.*" Mrs. Goodwin corroborated her husband: "As we passed I saw a man in the car which was on the bridge. *He turned his face directly toward me. He was a stout-built man with a broad face, clean shaven.* The car in which he was sitting had a glass on the sides and the glass on the side next to me was half way down. The man appeared to be a middle-aged man. I did not see anybody else in the car. *I know the defendant, and the man in the car looked like him, but I will not say that it was. My impression is that it looked like him.*"

H. E. Holland testified: "About 1 o'clock a.m., on the morning of 25 March I was traveling South along highway No. 50, and after leaving Apex, N. C., I passed two automobiles going north. As I approached a curve I was traveling forty or forty-five miles an hour, and the two cars which I met were traveling from thirty to thirty-five miles an hour. The rear car pulled out as if to pass the car in front and then *the driver of it put his head out of the window so that I could see him. He looked like the defendant.* I do not know the defendant, and never saw him again until after this trial started, when I was told that he would be brought from the jail, and I was told to sit in the hall of the courthouse downstairs. *When he came by I thought I recognized him as the man I saw in the coupe on the early morning of 25 March, 1928.* The night was misty and there was a mist on my windshield. The reason I was particular and watching occupants of cars was because I had in my pockets between $600 and $700 in cash, receipts from my filling station at Oxford. Shortly after I passed this car, and about one mile from Apex I found lying on the concrete paving of the road *a woman's blue felt hat without any brim.* When I found it I saw it was dry—not rained on and had not been run over or touched by any automobile. *On the inside was a blood stain as large as a quarter of a dollar.* This hat is the one Deputy Desern and McCauley have, and is the hat now exhibited to me. I carried it home in my car that night and gave it to the sheriff Tuesday following. *It is the hat Mrs. Yandel identified as worn by her mother the night she was murdered.*"

G. W. Blair, sheriff of Chatham County, testified: "I was called upon to investigate the affair at Avent's Ferry Bridge about 10 o'clock Sunday, 25 March. . . . I examined the roadway at the end of the bridge on the Lee County side. *I examined the tracks of the automobile closely; the print of the tire was distinct and clear. I know the automobile of W. H. Lawrence, and have examined the tread of his car, and the same kind of tread made the track.*" As to his conversation with the defendant, he testified: "I was sheriff and asked him to give us information about Mrs. Terry. *At first he denied knowing her.* He said that he would be glad to, but that *he only knew Mrs. Terry slightly;* that he knew of no one who had any enmity towards Mrs. Terry. *He said that he had never been with her; that she had never been in his automobile;* that he was sure of that; that he only slightly knew her; he said he didn't know how she made a living; *that he had never loaned her any money;* that he never thought of such a thing. I asked him if he ever sent Mrs. Terry $100 to Atlanta; he hung his head and admitted that he did. Then he said he had once carried Mrs. Terry and Mrs. Andrews in his automobile to Winston-Salem. Then he said one time he brought her from Greensboro to Durham; and he said the last time he spoke to Mrs. Terry was when he carried her to Winston-Salem. . . . He said 'Jesse Cannady and myself sat on the pipe railing at the Trust Building from 8 to 8:30.' *He said that he then went to his office and wrote his girl a letter; he gave me the lady's name and address at Cooleemee;* that he finished the letter about 9 p.m.; that he didn't want the lady's name in it; *that he was engaged to her;* that he mailed the letter; that he saw Jesse Cannady again and spoke to him at the Sport Shop; that he then got his automobile and went to Grigg's Filling Station, where he got some oil and had the alcohol drained out of his radiator; *that he went home at 9:30 p.m., and went to bed.* . . . Said that he crossed the bridge at Avent's Ferry the last time three or four weeks before that time, that time being 11 April; that Mrs. Terry had said on the Winston trip that she liked him, but that he turned it off because he would not marry a woman with a house full of children; that he spent the night, when he took Mrs. Terry and Mrs. Andrews to Winston-Salem, at the Robert E. Lee Hotel; that Marvin Teer introduced him to Mrs. Terry eight years ago; that he had been drinking the time he went with Mrs. Terry to Chapel Hill; that he didn't know his dry-cleaner's name. Mr. Lawrence gave us his automobile key and told us where his automobile was located, and Mr. Hall and Mr. King went and got his car. I looked in the car. *I examined the tracks—the tracks of the car—and they were exactly the same as those I saw at the bridge. We found blood spots or stains in the car;* it is a Nash coupe. I found three or four blood spots in it; *that evening we found eight or nine on the box back of seat on the right-hand side, just back of a person's neck sitting in the car; the steering wheel is on the left side.* On the right-hand rear fender there were stains which appeared to be blood stains. In front of where a person sits on the right side there appears to be a blood spot. *I would not say positively that any of the stains were blood stains.* After examining the car I asked Lawrence if he had done anything that would cause blood to be in the car; at first he said 'No'; then he said a man did get in his car with a package of meat some time back. I asked him who the man was and he studied a minute and said he didn't know his name; then he said about two weeks before he cut his finger in his car, and it bled freely while sitting in the car; he held up his thumb and forefinger—I think on his right hand; I didn't see any scar; he said he cut his finger in closing his knife. He was arrested afterwards. . . . Mr. Lawrence spoke to me about owning land near the bridge. He said he had crossed the old Ferry flat. *Mr. Desern asked him what way he went to the Ferry, and he said he usually went down No. 10 and up No. 50; that way leads by Cary and Apex.* The Brick Haven road was built some time ago. The distance from Durham to Avent's Ferry Bridge by Pittsboro is 48 to 48½ miles; by Route No. 10 and Merry Oaks by No. 50 it is 47 or 48 miles. . . . Mr. Lawrence said two or three times, 'Sheriff, I think when you trace it up you will find some one else beside me.' There was no objection by Mr. Lawrence as to giving up his key to his automobile."

The undertaker, Warlick, testified: "I took charge of the body of Mrs. Annie Terry. I made a thorough examination of it and found several wounds and bruises. *There was a hole in the side of the head behind the right ear about the size of a quarter of a dollar,* a swollen bruised place behind her left ear, with the scalp cut, her lips and mouth were swollen and bruised as if by blows, *across her forehead were several bruises about the size of a lead pencil running diagonally, as if struck with some instrument, and on her upper arms bruises, and underneath her forearms bruises, about the size of your finger, as if inflicted while* *her arms were raised upwards in front of her face above her head,* and a large bruise on her thigh. . . . I got the body at the river about three miles below Avent's Ferry Bridge. It was clothed. She did not have on any coat *or hat,* and no pin or jewelry of any kind except a small ring, was on her person."

G. A. Allison testified: "I am telegraph operator and railway station agent at Cooleemee, N. C., and was living there in 1927, and I knew the defendant who spent some time there. The defendant's general character was good while he was at Cooleemee." This witness identified a telegram to the defendant from Atlanta, Ga., dated 17 June, 1927, signed, "Annie," asking the defendant to telegraph her $200 to No. 1268 DeKalb Avenue, Atlanta, Ga.; a telegram from the defendant to Mrs. Annie Terry, No. 1268 DeKalb Avenue, Atlanta, Ga., reading as follows: "Impossible to send two, wire if one will do any good. Herbert." And a telegram to the defendant from Atlanta, Ga., signed "Annie," dated 28 June, 1927, reading as follows: "One will do. Annie."

J. E. Johnson testified: "On 29 June, 1927, I was in charge of the Western Union Telegraph office in Salisbury, N. C., and my records show that on that date $100 was telegraphed to Mrs. Annie Terry, No. 1268 DeKalb Ave., Atlanta, Ga., by a person signing his name 'W. H. Lawrence.' "

Geo. H. Brooks, coroner of Chatham County, testified: "Pursuant to the order of Judge Nunn, took possession of the automobile of the defendant, W. H. Lawrence. *It was a Nash, with wire wheels and Firestone Balloon tires.* It has one seat inside and a rumble seat in the rear. It was a sport made coupe, six cylinder car, practically new. *I examined the automobile thoroughly and found a number of spots on the back rest of the seat inside and on a ledge at the top of the back rest which I think looked like blood.* There were also some spots near the edge of the seat on the right-hand side and some on the dashboard *which looked like blood.* There were other spots on the outside of the car, namely, on the hood, the fenders, the door and one spot on the back rest of the rumble seat which looked like blood."

W. R. McCauley, deputy sheriff of Lee County, testified: "I went to Avent's Ferry Bridge and *examined imprints of automobile tires at both ends of the bridge* which were pointed out to me. I have since examined the tires of the automobile belonging to the defendant and *the imprints which I saw at both ends of the bridge were similar to the tread of those tires.* I also saw some spots inside of the defendant's automobile *which looked like they might have been made by blood.* There were a few small spots, the largest one was about the size of the nail of my little finger and the others were similar. *I am satisfied they were blood.*"

C. T. Desern testified: "I think it rained a little something towards 11 or midnight; something like that; possibly rained just a little. I would suppose it is between twenty and twenty-five miles from Apex to Avent Ferry Bridge by Route 50. . . . This document is out of the register of the Robert E. Lee Hotel at Winston-Salem, under the date of the eighth month, eighth day, 1927—8 August, 1927. I got that out of the original record. I have seen W. H. Lawrence's handwriting, and would know it if I were to see it again. Those three names—W. H. Lawrence, Mrs. C. Andrews, Mrs. W. M. Terry—are in the handwriting of W. H. Lawrence. . . . *While talking to Sheriff Blair the defendant was nervous, and his lips trembling, his voice breaking, and apparently frightened.*"

L. L. Ford: Identified the register sheet of his hotel (Empire Hotel of Salisbury, N. C.), of Sunday, 4 December, 1927, upon which appeared the name "W. H. Lawrence, Burlington, N. C.," the writing being identical to that of defendant, and just above the defendant's name there appeared the name "Mrs. Raeford Terry (same as Mrs. Annie Terry), Durham, N. C." . . . "The photograph of Mrs. Annie Terry looks like the lady who came in the Empire Hotel with the defendant. They both left the next day."

Defendant's automobile was brought by Coroner Geo. H. Brooks from the home of the sheriff of Chatham County to the courthouse green, *where it was viewed by the jury, at which time the coroner pointed out to the jury the spots, or some of the spots, which he had testified to previously.*

During the trial defendant attempted to commit suicide. John Burns, deputy sheriff of Chatham County, testified: "I had the defendant, W. H. Lawrence. I put him in the cell Friday night, 18 May, right about sundown, the best I remember. He seemed all right, in good shape when I put him in the cell. The next time I saw him after I put him in there was about 6:25 the next morning. The cell door was locked and I had the key. There is no other key to it; no one had access to the cell during the night. When I saw him the next morning at 6:25 his throat was cut. I couldn't say how bad he was cut; he was cut right much; he bled right much. There was a cut across his wrist on the left hand. When I saw him he was lying on his back on the bed in the cell. I went in the cell to turn out a prisoner that works here on the road that has been tried and sentenced on the road for six months in this county now. I went in as quietly as I could. Friday, the morning before, the door slammed and woke Mr. Lawrence up, and I told him that I would try to be quiet next morning and not wake him up, and I went in as quiet as I could—so as not to disturb him—and while I was unlocking the door where this prisoner was in the cell next to his, he called me and said, 'Mr. Burns, I wish you would give me your gun,' or 'let me have your gun.' I said, 'Mr. Lawrence, you don't need no gun.' I thought he was just kidding me. He said he wanted to finish the job. I said, 'Mr. Lawrence, what in the world,' and he said, 'Mr. Burns, they are framing up on me, and it is more than I can stand.' There was a little safety razor blade in his left hand, in his fingers. . . . I would estimate that he had bled half a gallon. . . . Mr. Lawrence gave me a letter; he told me there was a note there on the bed. My hands were bloody and some one else put it in my pocket, and I think I gave it to Harry Norwood. I think this is the note." The witness read the note, which is as follows: "To all my friends: Since they have started lying so much, it is impossible for me to stand it any longer. So please pardon me for this act I am about to commit. You all know I am not guilty, and I am being lied on by some, and the worst ones for that are still to come, so this is the shortest way out. Good-bye to you all. W. H. Lawrence." Witness continued: "The wound was on the right side of his neck. I could estimate it to be about four or five inches long. It looked to be. Mr. Lawrence told me that they were framing up on him, and that he could not stand it. He told me also that he was not guilty."

Jack Womble testified: "I lived at Merry Oaks, N. C., on 24 March, 1928, and was working at a filling station there; between 10 and 11 o'clock that night a *green coupe automobile* came to the filling station *occupied by a man and a woman;* it was *a green coupe with wire wheels.* The man called for two soft drinks, which I went back to the filling station and got and took them to the automobile. The man in the car had a broad face, broad shoulders, and was clean shaven. It was about 10:30 o'clock when the car drove up to the filling station. When it left it went south for a few hundred yards, turned to the left, *crossed the railroad and turned into the Avent's Ferry road,* passing out of my sight. Only one other car, a Ford, crossed the railroad going that way on that night. I told Mr. Desern, deputy sheriff, about it. *The woman in the car was a settled aged woman.* There was no one at the filling station but me. Neither one of the occupants of the car got out. It started off after staying there for three or four minutes. I never saw the defendant until I saw him here at the courthouse. *I think the man in the automobile looked like him, but I will not swear that it was him."*

Q. "Now I want to ask you, this man is being tried for his life, if you will undertake to swear definitely and positively that the man that you saw in that automobile was Mr. W. H. Lawrence?" A. "No, sir, *I would not swear so, but I think it was."*

Dr. C. A. Shore: "I am a physician and I am director of the State Laboratory. I have had experience with the microscopic examination of blood. I have been in my present position for twenty years. I see blood almost every day under the microscope and make microscopic examination of the blood cells almost every day. I recall a green Nash coupe automobile which was brought to my laboratory by Mr. Brooks, the coroner of this county. I made a microscopic examination of the stains or spots on the inside of that car and upon the seat. *I think some of those spots were blood spots.*"

The movements of Mrs. Annie Terry, Saturday, 24 March, 1928. In the evening she took supper at her own home with a married daughter, Mrs. Mary Yandel, and her two sons, Robert and Edgar Terry. The telephone rang and the deceased answered it, but no one heard the conversation. This occurred a little before 7 p.m. After supper, and after Mrs. Yandel had left, the deceased changed her clothes and asked her son, Robert Terry, to take her in his automobile to the bus station in Durham. They left the house about 7:20 p.m. When, however, they had reached Kronheiner's store on Main Street, which is about four and one-half blocks from the bus station, at her request her son stopped the car and let her out there. None of her children saw her again until after her dead body was found, on 3 April. Mrs. Annie Terry, the deceased, appeared that night between 7:30 and 8 o'clock at the store of Oren Holmes and remained not more than two minutes. This store is about two blocks south of the Union Bus Station. The same night, soon after Mrs. Terry was seen at the store of Holmes, Robert Dixon saw some one in an automobile, among a number of other automobiles, at the corner of Holloway and Dillard streets, whom he recognized as the defendant. Some one was with him, but he could not see who it was, nor whether it was a man or woman. All of her children testified that Mrs. Terry was wearing a dark blue felt hat which had no brim, and one of them testified that she also had on a coat with fur collar and cuffs. No one who knew her personally saw her afterwards until her dead body was taken from the river on 3 April.

The North Carolina Highway System map was put in evidence to indicate the routes.

The defendant introduced numerous witnesses as to his general reputation being good. That there were no blood spots on the car. Relied on an alibi and contradiction of some of the State's witnesses. Defendant cites *S. v. Brackville,* 106 N. C., 701; *S. v. Goodson,* 107 N. C., 798; *S. v. Gragg,* 122 N. C., 1082; *S. v. Montague,* 195 N. C., 20, and cases from other jurisdictions. See *S. v. Prince,* 182 N. C., 788.

The defendant contends that the State has utterly failed to make out a case against defendant. That "this Court has decided in a number of the cases hereinbefore cited that the State must offer legal evidence sufficient to establish the guilt of the accused. We believe that the weakest of the cases cited contains more evidence in favor of the State than the case at bar. Conversely, the case at bar is weaker than any of the cases which this Court has held were too weak to be submitted to a jury."

(1) *As to the identification of the automobile tracks* at the bridge being like those made by defendant's car, *S. v. Brackville, supra,* is cited by defendant. It is said in that case, at p. 709: "That his tracks were seen by one witness as if he were going from the place where the body of the deceased was found towards the house from which he was taken, but this evidence was not definite or satisfactory. So far as appears, the tracks were not scrutinized; they were not measured; the prisoner's feet were not measured or fitted to the tracks, nor did it appear that his feet were at all peculiar in any respect, nor did the witness say how she knew the tracks were his. . . . (p. 710). Leaving out the evidence as to the tracks, the leading facts, whether taken severally or collectively, and in their combined force, were not necessarily inconsistent with his innocence. As we have seen, the evidence as to the tracks was very unsatisfactory."

Standing alone, this evidence was slight. It was in evidence that defendant had a new green Nash coupe. It had on it Firestone tires—treads on the casing; these made marks or tracks. The car on the bridge from which Mrs. Annie Terry was thrown into the river, stopped, crossed the bridge and turned around and crossed to the Chatham County side, and then went back on the bridge. The same night, and a few hours afterwards, the tracks were examined. The ground was just soft enough for a car to make good plain prints, and they were described by the witness, "They were still distinct and well marked—pretty plain." It was in evidence that a car was on the bridge at 11 o'clock at night with lights burning, and as the witness Goodwin got nearer the lights were turned off. The man was in *"a green one-seated car with wire wheels."* The witness saw the car owned by defendant. *"It looks like the one I saw on Avent's Ferry Bridge that night."* His wife, who was with him, testified that she knew defendant "and *the man in the car looked like him."* Taking all these facts, it was a circumstance with other circumstances that were relevant to the inquiry. See *S. v. Matthews,* 162 N. C., 542; *S. v. Trull,* 169 N. C., 363; *S. v. Young,* 187 N. C., 698.

(2) *As to opinion of blood spots on the car,* Dr. C. A. Shore testified: "I think some of those spots were blood spots." W. R. McCauley, "I am satisfied they were blood." And other evidence to the like effect as to their opinion that it was blood on the car were circumstances and were relevant to the inquiry.

(3) *As to the identity of defendant:* (a) "I know the defendant, and the man in the car looked like him, but I will not say that it was. My impression is that it looked like him." (b) "He looked like the defendant. . . . When he came by I thought I recognized him as the man

I saw in the coupe on the early morning of 25 March, 1928." (c) "I think the man in the automobile looked like him, but I will not swear it was him. No, sir, I will not swear so, but I think it was."

This kind of evidence has frequently been held to be admissible in this jurisdiction. In *S. v. Costner,* 127 N. C., at p. 572, it is said: "She was asked by the Solicitor, 'What is your opinion, from what you saw of the man that night, as to who it was?' She answered, 'The figure in the room that night compared more favorably with Wade Costner than any one else I could think of in that community.' "

In *S. v. Carmon,* 145 N. C., at p. 484, it is said: "The witness George Kluttz testified that he knew the defendant and had known him for two months; that, while it was dark when the assault was committed, he 'got a glimpse' of him just after the pistol was fired, a second only intervening, and that he 'thought' it was and 'took it to be' the defendant, the latter being only fifteen feet from him at the time. His father stated that, while his vision was obscured by the fact that he was looking from a lighted room, his store, into the darkness without, and it was almost impossible for that reason to recognize a person, yet he 'threw his eyes around' immediately after the firing of the pistol and saw a person whom he 'took to be' the defendant, and he also saw a pistol in his right hand, or something that looked like one. He further stated that the defendant ran in the direction of the Climax Hotel, though it appeared that this was not in the direction of his home. It seems to us that this testimony is as strong as that which, in *S. v. Lytle,* 117 N. C., 803, was permitted to go to the jury, and upon which their verdict and the judgment were sustained by this Court. Indeed, we are of the opinion that the testimony in this case is much stronger than the testimony of the witness John Dawkins was in *S. v. Lytle.* He testified in that case as follows: 'I recollect the night when the barn was burnt. I met a man whom I took to be Lytle in the road, near my house. He was a low, chunky man. It was too dark to see whether he was white or black. He had his back to me; had on a dark sack coat. I have known Lytle ten years; have seen him often. Had I spoken to him I would have called him Lytle.' "

In *S. v. Lane,* 166 N. C., 336, it is said: "The testimony of E. Hillman that the man he saw coming towards Joab Lane's house looked like the defendant, was competent in connection with the other evidence of identity."

In *S. v. Walton,* 186 N. C., at p. 489, it is said: "The exception that the court permitted the witness Jones to testify that he took the man who held him up at the crossroads that night to be Len Walton was properly overruled. *S. v. Spencer,* 176 N. C., 713; *S. v. Lytle,* 117 N. C., 803, and *S. v. Thorp,* 72 N. C., 186."

(4) *The attempt to commit suicide.* This evidence is in the record, and it has been held that such a circumstance is competent to be considered by the jury, when determining the guilt of defendant in connection with other circumstances.

In *S. v. Dickerson,* 189 N. C., at p. 331, it is said: "In *S. v. Case,* 93 N. C., 546, it is said: 'In criminal cases every circumstance that is calculated to throw light upon the supposed crime is admissible. *S. v. Swink,* 19 N. C., 9. The fact that immediately after the discovery of the crime the person charged with its commission flies (fled), is admitted as a circumstance to be considered by the jury. *S. v. Nat,* 51 N. C., 114. So it is held that if the prisoner, when arrested, attempts to make his escape, or attempts to bribe the officer to let him escape, the evidence is admissible. 11 Ga., 123; *Fanning v. State of Missouri,* 14 Mo., 386; *Dean v. Commonwealth,* 4 Grattan, 541; 26 Ia., 275.' In *S. v. Tate,* 161 N. C., 286, it is held: 'But such flight or concealment of the accused, while it raised no presumption of law as to guilt, is competent evidence to be considered by the jury in connection with the other circumstances. 12 Cyc., 395; 21 Cyc., 941.'" *S. v. Hairston,* 182 N. C., 851; *S. v. Stewart,* 189 N. C., at p. 347; *S. v. Adams,* 191 N. C., at p. 527; *S. v. Mull, ante,* 351; *Commonwealth v. Madeiros,* 255 Mass., 304, 47 A. L. R., 962.

It is said in *S. v. Steele,* 190 N. C., at p. 511, speaking of flight: "The basis of this rule is that a guilty conscience influences conduct. From time immemorial it has been thus accepted. 'The wicked flee when no man pursueth; but the righteous are bold as a lion.' 28 Prov., 1. 'Thus conscience doth make cowards of us all.' Hamlet, Act III, scene 1. 'Guilty consciences always make people cowards.'—The Prince and his Minister, Pilpay, ch. III, Fable III."

Suicide is in the nature of flight. In *S. v. Blamcett,* 24 New Mexico, 433, 174 Pac., at p. 209, the following observations on the subject are made: "It is next contended that the court erred in admitting in evidence and in instructing the jury that it might consider proof of the attempt of the appellant to commit suicide. It is urged in this connection that proof of the attempted suicide is not analogous to flight and does not involve any suggestion of guilt. It is urged that in the case of *S. v. Coudotte,* 7 N. D., 109, 72 N. W., 913, the Court held that there is no presumption of guilt arising from the fact that the person charged with crime, and while in confinement and before trial, attempts to commit suicide. It is suggested that the case of *S. v. Jaggers,* 71 N. J. Law, 281, 58 Atl., 1014, 108 Am. St. Rep., 746, while holding to the contrary, it is not supported by reason or authority. We, however, do not agree with appellant's contention in this respect. Other than the cases cited by appellant, our attention is directed by the State to the case of *People* *v. Duncan,* 261 Ill., 339, at 353, 103 N. E., 1043, 1049. The Supreme Court of Illinois in that case held that: 'The fact that defendant attempted to commit suicide was a circumstance which was properly to be taken into consideration by the jury in connection with all the other facts and circumstances proven.' "

In the present case defendant was *sui juris*—a man of mental and physical vigor, perfectly normal. He had been leading a double life, his trial was on, he could not stand the humiliation and disgrace, and in his endeavor to escape the punishment, he anticipated from the evidence adduced, he attempted to kill himself. This is somewhat akin to flight.

The automobile was viewed by the jury, and some of the spots pointed out to them. The power of the court below to order a view by the jury is set forth in *S. v. Stewart,* 189 N. C., p. 345. In the present case there seems to have been no objection.

It is sometimes difficult to determine what is and is not sufficient evidence to be submitted to a jury. Under the Constitution of this State, this Court has jurisdiction upon appeal to review any decision of the courts below "upon any matter of law or legal inference." It is the province of the jury to determine the facts and that of the court to state the law. The right of trial by jury has ever been closely allied with the cause of human liberty. "The right of trial by jury," says *Mr. Justice Story,* "is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment on it has been watched with great jealousy. The right to such a trial is incorporated into and secured by the constitution of every State in the Union. In Magna Carta the basic principle of that right is more than once insisted on, as the great bulwark of English liberties, but especially by the provision that 'no freeman shall be hurt, in either his person or property, unless by lawful judgment of his peers or equals, or by the law of the land.' "

The jury has convicted the defendant of murder in the second degree. If this verdict is premised on sufficient evidence it must stand under the law. This Court cannot erect a despotism of five men. If, on the other hand, it is premised on conjecture, suspicion or mere scintilla, it is the duty of this Court to so declare. *S. v. Swinson, ante,* 100. We are constrained to decide as a matter of law that the evidence was sufficient to be submitted to a jury and the probative force was for them.

The links in the chain of circumstantial evidence. The defendant and Annie Terry, from the evidence, had for years been engaged in secret illicit relations. They were settled-aged man and woman. They seemed to get together generally on Saturday nights, both living in Durham, and he, being a contractor, coming home for the week-ends. She had carefully kept some fifteen of his letters, he signing all of them "Rover."

She even kept the one he had written on, "Burn this." It seems that she had upbraided him about women. He warned her in one letter not to say too much, or he would have to leave this country. He would phone her and they would go for a ride, or other arrangements be made for their meetings. At one time she went to Salisbury to meet him. He sent her money to Atlanta. The telegrams between them were signed "Herbert" and "Annie." The time had come when the illicit relationship had to cease. He became engaged to marry another woman. Annie Terry was thrown in the river at Avent's Ferry Bridge at about 11 o'clock on 24 March, 1928. This bridge was some forty-eight miles from Durham, and defendant usually went to the ferry down No. 10 and up No. 50, by the way through Cary and Apex. At 9 o'clock that night he stated that he went to his office and wrote his fiancee at Cooleemee a letter and mailed it. He said he went home at 9:30 and went to bed. That evening Annie Terry was at her home; took supper with her children. The telephone rang; she answered it. This was about 7 o'clock. She changed her clothes and asked her son to take her to the bus station, but she got out of his car some four and a half blocks from the bus station. The last trace of her in Durham, from the evidence, was between 7:30 and 8 o'clock at Oren Holmes' store about two blocks south of the Union Bus Station. She was wearing a dark blue felt hat which had no brim. The evidence would indicate that after defendant wrote the letter to his fiancee, by telephone or otherwise they got together as usual on Saturday nights. Defendant had a new green Nash coupe, Firestone tread on the tires. He was raised at the old homestead, his father now dead, and he and the other children inherited the land that ran to the river and Avent's Ferry Bridge, where the murder took place. He knew the river, the depth of the water at the bridge 18 to 20 feet. His motive was to get rid of her so he could marry his fiancee, to whom he had written that night. He and she got in his car. He could easily drive to the Avent Ferry Bridge in an hour or so. He drives from Durham down No. 10 to Cary, then on No. 50 to Apex, and then to Merry Oaks. Jack Womble was working on the night of 24 March at a filling station at Merry Oaks. About 10:30 o'clock that night a green coupe with wire wheels, occupied by a man and a woman, drove up. The man called for soft drinks, which Womble got and took to the car. The man in the car had a broad face and shoulders and was clean shaven. The defendant answers this description. The woman in the car was a settled-aged woman. The car did not continue down No. 50 towards Sanford, but he watched it go south for a few hundred yards, turn to the left, cross the railroad and turn into the Avent Ferry Bridge road. Womble testified, "I think the man in the automobile looked like him (defendant), but I will not swear that it was him. I would not swear so, but I think it was." The death car reaches Avent Ferry Bridge. The fishermen hear the pitiful screams and cries of a woman, and a sound as if some one had been thrown into the water. The car that came upon the bridge was a smooth-running gear-shift car, and sounded like it was new. The car, after the woman had been thrown in the river, moved across the bridge to the Lee County side, turned around and came back, crossed the bridge and then came upon the bridge again, stopped and the lights were turned out. A heavy voice was heard talking to some one in the water. Some hour and a half after, the rescuing party heard a voice down the river in distress, and the voice soon hushed forever. The body of Annie Terry was found on 3 April down the river about three miles. There were blood spots on the third or fourth span of the bridge as big as a man's hand, and hair and blood on the inside and outside of railing. The undertaker testified her lips and mouth were swollen and bruised as if by blows across her forehead, and other bruises as if struck by some instrument, and bruises inflicted while her arms were raised upward in front of her face above her head. When the body was found she did not have on a hat. Defendant's car was examined thoroughly and a number of spots which looked like blood were found on the back rest of the seat inside and on a ledge at the top of the back seat. This was on the side the woman sat. There were other spots on the outside of the car. Dr. Shore, who made a microscopic examination of the spots, testified, "I think some of those spots were blood spots." At 11 o'clock Charlie Goodwin and his wife came by, and as he approached Avent Ferry Bridge from the Lee County side he saw an automobile on the bridge with its lights burning, as they got nearer the lights were turned out. He testified that it was a green, one-seated car, with wire wheels. The man in the car was stout, broad-faced, the description corresponding to defendant and his car. The automobile of defendant looked like the one he saw on the bridge that night. His wife testified he turned his face directly towards her; he was a stout-built man with a broad face, clean shaven. "I know the defendant, and the man in the car looked like him, but I will not say that it was; my impression is that it looked like him." The man on Avent's Ferry Bridge starts back towards Durham via Apex and Cary. H. E. Holland was watching the road closely, as he had a large sum of money in his pockets, and was traveling south along No. 50. After leaving Apex he passed two automobiles going north, in front a sedan, behind a coupe. The coupe passed the sedan and the driver put his head out of the window; he could see him. "He looked like defendant." At the time of the trial he testified: "When he came by I thought I recognized him as the man I saw in the coupe on the early morning of 25 March, 1928." Shortly after Holland passed the coupe, about a mile from

Apex, he found lying on the concrete paving of the road a woman's blue felt hat without any brim. On the inside was a blood stain as large as a quarter of a dollar. The hat was identified as that of Annie Terry, worn by her on the night she was killed. The man who killed her, on the return trip, no doubt, after striking her in the head the hat was knocked off in the car, and when he found it on his return, he threw it out on the road. Many witnesses testified that defendant's car had such tread tires that make a track similar to those found going on the bridge, turning around and coming back on the bridge, also the similarity of the death car on the bridge with defendant's car. These tracks were distinct and clear, and the tracks were examined closely; the ground at the time was soft enough for a car to make a good print. When confronted, the defendant denied knowing Annie Terry, then admitted knowing her slightly and made other denials, which were contradicted. To cap the climax, when the web was being wrapped around him during the trial, he attempted to commit murder and kill himself. The jury that tried him viewed the spots on his car. We think the evidence was sufficient to be submitted to the jury. Its probative force was for them. In the record we find

No error.

BROGDEN, J., dissenting: Did the defendant throw Annie Terry from the bridge at Avent's Ferry on the night of 24 March, 1928, at about 10:30 or 11 o'clock?

Avent's Ferry Bridge is on a public road. Several other public roads run into the road leading to the bridge. The bridge is neither a secluded nor a desolate place, but one much used by the public generally. While the defendant and his brothers and sisters owned as tenants in common the land of their deceased father, there is no evidence in the record that any living person had seen the defendant upon the land or traveling this particular road in twenty years.

The State relied wholly upon circumstantial evidence for conviction. The defendant by motions of nonsuit, challenges the sufficiency of the evidence and contends that the trial judge ought not to have submitted the case to the jury. Upon such motions, the defendant was entitled to have the entire evidence in the case, both for the State and himself, considered and weighed by the trial judge and viewed in a light most favorable to the State. C. S., 4643; *S. v. Killian,* 173 N. C., 792; *S. v. Brinkley,* 183 N. C., 720; *S. v. Pasour,* 183 N. C., 793. Viewing the evidence "in a light most favorable to the State" does not mean that the viewing eye shall be overindulgent, or that the viewing mind should span gaps or forge material links or supply essential deficiencies in the evidence, because the State is, and ought to be, as much interested in liberty as in punishment. In discussing this aspect of the law, *Allen, J.,* in *S. v. Oakley,* 176 N. C., 755, wrote as follows: "It is neither charity nor common sense nor law to infer the worst intent which the facts will admit of."

It is not legally accurate to say that the weight and probative value of evidence is exclusively a question for the jury. This is true only when the jury receives the case for consideration. The trial judge is the weigh-master in the first instance, and it is primarily his duty to weigh the evidence in order to determine whether or not it is sufficient to be submitted to the jury.

What then are the tests or sign-boards which the law has set to guide the judge in determining this preliminary and fundamental question? In criminal cases the weighing tests may be classified as follows: (1) Every man is presumed to be innocent until the contrary is proved, and it is a well established rule in criminal cases that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the party accused the court should instruct the jury to acquit for the reason that the proof fails to sustain the charge. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence. *S. v. Massey,* 86 N. C., 658. (2) The evidence must be more than a scintilla. A scintilla is some evidence, and is defined by this Court as "very slight evidence." *S. v. White,* 89 N. C., 463. (3) "Evidence which merely shows it *possible* for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left with the jury." *Wittkowsky v. Wasson,* 71 N. C., 451; *S. v. Vinson,* 63 N. C., 335; *S. v. Massey,* 86 N. C., 658; *S. v. Powell,* 94 N. C., 965. (4) The evidence must reasonably warrant the verdict. In cases where the State relies upon circumstantial evidence alone, when is a verdict reasonably warranted? *Stacy, J.,* in *S. v. Melton,* 187 N. C., 481, has given a clear and comprehensive answer to this question in the following words: "It is the accepted rule of law, at least in felonies and capital cases, that where the State relies for a conviction upon circumstantial evidence alone, the facts established or adduced on the hearing must be of such a nature and so related to each other as to point unerringly to the defendant's guilt and exclude every rational hypothesis of innocence."

Therefore, in brief, a trial judge is not justified in submitting a case of this sort to the jury unless the evidence is more than very slight; creates more than a possibility, conjecture or grave suspicion; excludes every rational hypothesis of innocence and points unerringly to the guilt of the defendant.

Bearing these established principles of law in mind, it becomes necessary to analyze the evidence in order to ascertain if it measures up to the standard declared in the law.

The State relies upon five elements as tending to identify the defendant as the perpetrator of the crime, to wit: (1) Motive; (2) automobile tracks; (3) personal identity; (4) blood; (5) attempted suicide.

(1) Motive is built of substantially the following facts: When the defendant was first questioned by the sheriff he stated that he was engaged to be married. The evidence does not disclose that any specific date had been set for the ceremony. Fifteen letters were offered in evidence, written by the defendant to the deceased. Only two are dated. Of these, one is dated 29 December, 1925, and another 20 April, 1926. Another is dated 27 September, but there is nothing to indicate the year. These letters, covering certainly a period of years, indicate a desultory illicit relationship. Beyond this, they are as colorless as the mummy of the alleged Tutankhamen. They all begin with the formal salutation: "Dear Mrs. Terry," and several of them close with the prosaic farewell: "Yours truly—Rover." There is not a word of endearment or affection in any of them. There is no evidence that the deceased wanted or expected to marry the defendant. There is no evidence that the deceased knew or had reason to believe that the defendant was engaged. There is no evidence of any quarrel, fit of jealousy, ill-will, grudge or threats. These are the usual, if not universal sources, out of which motive flows. I know of no case, and none has been called to my attention, in which motive has been supposed to spring from any other source. The suggestion is that it was necessary for the defendant to be rid of the deceased so that he could at some time marry another woman. In order to build a motive out of these independent and unrelated facts three important guesses are required, to wit: (a) That the deceased in some way heard that the defendant was engaged and contemplated marriage at some indefinite time; (b) that as a result of such information she flew into a rage and threatened to "tell the world" that the defendant had been guilty of adultery; (c) that thereupon the defendant, fearing the gossip, or an accusation of adultery, or assignation, lured the deceased into his automobile, drove her fifty miles to a public bridge, buying soft drinks on the way—knocked her in the head and threw her into the river. There is not a syllable or line of evidence in the record, as I read it, to support or create any of said guesses. Essential facts cannot be supplied by conjecture or created by speculation.

Applying the standard fixed by law for measuring evidence, can it be said that the evidence of motive is more than "very slight—a scintilla"—or does it create more than a "possibility" of truth? I think not. If this conclusion is correct, then all the alleged evidence of motive is no more than a legal zero.

(2) But the State contends that the automobile tracks found at the bridge are the same kind of tracks as were made by defendant's automo-

bile; hence such tracks tend to identify the defendant at the scene of the killing. On this phase of the case the evidence is as follows: "I would say that the marks on the casing of that car (defendant's) were the same as the marks and tracks I saw on the bridge—Firestone tread." But this same witness further said: "I have not observed the tracks made by those tires (defendant's). Firestone casings are very popular, high-class tires, I think. The Firestone is a very common tire used in this country. And the tread that I saw looked like it might have been made by a Firestone tire. I am pretty certain of that. That is as much as I can say." The purport of this testimony then, is that there was nothing peculiar about the automobile track. It was an ordinary Firestone tire track, and in nowise different from any other Firestone tire track, such Firestone tires being in general and common use.

Does this evidence create more than a "possibility" that a particular Firestone tire, to wit, that of defendant, made the particular track at the bridge? If not, the track evidence is merely another legal zero.

The State, however, contends that a green Nash coupe with wire wheels was seen on the bridge and in the community upon the night of the homicide. There was evidence on behalf of the defendant, not disputed or controverted by the State, that "there are a number of coupe style automobiles which resemble the Nash coupe, among them the Diana, the Buick, and Reo." Hence, there was nothing peculiar, striking or unusual about the defendant's automobile, either in its color, wire wheels or style. There was no evidence that the deceased and the defendant had ever been seen riding together until the night of the homicide, but there is undisputed and uncontroverted evidence that the deceased on Sunday afternoon, 4 March, 1928, at about 5 o'clock in the afternoon, got in a green coupe, just like the automobile of the defendant, on a public street in the city of Durham, with an unknown man—not the defendant—and drove away. She did not come back that night. This evidence shows that the deceased, a short time prior to her death, was associating with some man other than the defendant, who drove a green coupe with wire wheels.

(3) The next link in the chain of circumstances relied upon by the State consists in what is termed personal identification of the defendant upon the night of the homicide. This identification is based solely upon the testimony of three witnesses, to wit: Jack Womble, Mrs. Charlie Goodwin, and H. E. Holland. Womble testified that at about 10:30 o'clock that night a man driving a green coupe with wire wheels in which a "settled aged woman" was riding stopped at his place of business and the man purchased soft drinks. The witness said: "The man in the car had a broad face, broad shoulders, and was clean shaven. . . . I never saw the defendant until I saw him here in the courthouse. I

think the man in the automobile looked like him, but I will not swear that it was him." Mrs. Charlie Goodwin and her husband drove across the bridge at about 11 o'clock. She said, "As we passed I saw a man in the car which was on the bridge. He turned his face directly toward me. He was a stout-built man, with a broad face, clean shaven. . . . The man appeared to be a middle aged man. I know the defendant and the man in the car looked like him, but I will not say that it was. My impression is that it looked like him." It is to be observed that the witnesses do not undertake to say that the man they saw was the defendant or that in their opinion it was the defendant, or that they "took it to be" the defendant, or that their best impression was that it was the defendant. Giving their words their plain meaning and import, these witnesses say in substance that they saw on that night a stout-built man, broad shouldered, clean shaven and middle aged, and that this man "looked like" the defendant, because he, too, was a clean-shaven, broad-shouldered, broad-faced, middle-aged man. Clearly this evidence is no more than the conclusion or deduction of the witness. *S. v. Thorp,* 72 N. C., 186. Furthermore, this testimony at most identifies only the physical type or physical class of the person on the bridge, but evidence which merely designates the accused as a member of a certain physical class is insufficient and does not, in my judgment, "warrant a verdict of guilty," particularly when the witnesses, who are very intelligent, are careful to qualify their answers so as to exclude any impression that they claimed to have recognized the defendant. The witness, Holland, testified that on the night of the homicide he was driving an automobile at a speed of about forty-five miles an hour and met two automobiles. The rear automobile was traveling at a rate of thirty-five miles or more per hour, and the driver of the rear automobile attempted to pass the one in front and put his head out of the window. This witness was subpœnaed by the State and the defendant was pointed out to him by the officers. He testified in substance that the man he saw on the road looked like the defendant. He further testified that the night was dark and his windshield was covered with mist. This purported identification made on a dark, rainy night, while two automobiles were whirling at high speed through the mist and fog, is so reckless, fanciful, and totally contrary to the common observation of men who ride in automobiles and seek to identify even an acquaintance while the automobiles are traveling at high speed that I deem it unnecessary to discuss or waste time with such statements.

(4) Another circumstance urged by the State tending to identify the defendant was the presence of certain spots on the inside of the car which certain witnesses thought were blood stains or "looked like blood stains." The largest spot on the inside of the car was about the size of

the nail of the little finger. Others were about the size of a match head. But the car was taken to Raleigh by the officers and subjected to a careful microscopic examination by Dr. Shore, an expert and director of the State Laboratory. Dr. Shore said, "As far as I am willing to go is to say that I think some of those spots on the inside of that car were stains of mammalian blood." Mammalian blood covers a wide field, from a mouse to a whale. In order to give this evidence any weight at all two important facts must be supplied by guesswork, to wit: (a) That the mammalian blood referred to by the expert and other witnesses was human blood. (b) That such blood was also that of a particular human, to wit, the deceased. The blood evidence lies so clearly and so exclusively in the field of speculation and conjecture that I deem it unnecessary to debate this phase of the case.

(5) Finally, the State contends that the attempted suicide of defendant should be attributed to a consciousness of guilt. In the big cities of the United States in 1925 there were 2,808 homicides and 4,000 suicides. In other words, suicide was practically twice as prevalent as homicide. Who is wise enough to say that the 4,000 took their own lives because of a consciousness that they were guilty of some crime and that some day they might be apprehended or written up in a newspaper? There is no decision in this State upon the competency or relevancy of such evidence. The decisions in other courts are not uniform. A diligent investigation discloses but few cases dealing with the subject. This in itself is strong proof that suicide evidence is unusual and practically unknown to the courts. The courts holding the view that such evidence is competent rest the decision upon the ground that there is some sort of intangible analogy between suicide and flight. No other reason has ever been advanced by any court. I cannot see such analogy. The impulse to escape and the impulse to commit suicide in my judgment must necessarily spring from two totally different states of mind. The Supreme Court of North Dakota in *S. v. Coudotte,* 72 N. W., 913, has given, in my judgment, the clearest and most logical analysis of the question to be found anywhere in the books. In holding evidence of attempted suicide incompetent and irrelevant, the Court says: "One who flees does so, generally, for the purpose of avoiding the punishment that follows violated law. One who commits or attempts suicide seeks to avoid no punishment. He deliberately accepts the highest punishment that the law could possibly inflict—death. Hence the very circumstance that raises the presumption of guilt from flight is absolutely wanting in suicide. . . . When we essay the task of accounting for suicide on any general grounds, we undertake a task that from its very nature, is impossible of performance. The human mind is so wonderfully, yet so delicately, constructed, the human passions are so powerful, yet so varied, that it is idle for any

one person to pretend to enter the consciousness of another, and account for the inner workings of that other mind. We only know that, whatever may be the motive, it is not, and cannot be, a desire to avoid punishment. . . . This being true, a jury never should be permitted to treat it as evidence of guilt." Moreover, the defendant left a bloody note declaring his innocence and stating that he was committing the act because he was being "framed" and could stand it no longer. So far as the defendant was concerned, this was a dying declaration, and surrounded with all the solemnity of other dying declarations. One thing is certain, and that is that the mind in some way gives expression to its conclusions and emotions. It is the common observation of mankind that few men are willing to launch the mortal bark upon the dark waters of eternity with a lie upon their lips. This dying declaration accompanied and explained the act, and in my judgment was far more conclusive of the motive impelling the act than of some other motive carved bodily out of the wide spaces of imagination.

It is also significant that a man named Haskins was arrested and charged with the murder before a warrant was issued for the defendant. Haskins was a married man who was offered as a State's witness, and who testified that he knew the deceased and had called on her "once or twice and took her to ride in my automobile one night." The alibi of Haskins was accepted by the officers and he was released.

I do not know whether or not the defendant is guilty. All I know is the record which I have before me. From this record the deceased was associating with other men, and the evidence does not point "unerringly to the defendant's guilt," nor does it create more than a suspicion or possibility of the guilt of the defendant. The record leaves upon my mind the impression that the horror of the crime demanded a victim, and that as a result thereof the defendant was bound as a smoking sacrifice upon the altar of conjecture and suspicion. In my judgment, the case made against the defendant was far weaker than the *Montague case,* the *Goodson case,* the *Brackville case,* the *Lytle case,* or any other case in the books.

It is contended that the facts and circumstances are so slight in probative value that in themselves and standing alone they would not amount to evidence, but when taken in combination they constitute a rope of great strength. I do not concur in this reasoning. Unless the principles of mathematics have been recently changed, adding a column of zeros together produces zero; neither can a multitude of legal zeros beget a legal entity.

ALLIE A. CROMWELL v. CARL M. LOGAN AND RALPH BEACHAM, AND CARL M. LOGAN AND RALPH BEACHAM v. WALNUT MERCANTILE COMPANY, AND C. B. MASHBURN, RECEIVER, AND MRS. ALLIE A. CROMWELL.

(Filed 23 January, 1929.)

1. **Trial—Taking Case or Question From Jury—Nonsuit.**

Upon motion of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, will be considered in the light most favorable to the plaintiff, giving him every reasonable intendment thereupon and every reasonable inference to be drawn therefrom.

2. **Fraud—Right of Action and Defenses—Duty to Read Instrument.**

A person who can read and is capable of understanding an instrument is generally required to read a paper before signing it unless he is induced not to do so by positive fraud or false representations made by the other party and relied on by him.

3. **Same—Ratification—Deeds—Nonsuit.**

Where there is evidence tending to show that the plaintiffs were business men of intelligence and that they had an opportunity to read a deed in which was an agreement to assume personal liability for a debt as a part of the purchase price of lands, but that they signed the instrument without reading it because they assumed that it was drawn in accordance with a previous agreement, with further evidence that the defendants said nothing and did nothing to prevent the plaintiffs from reading the deed, and that after discovery of the error the plaintiffs ratified the fraud by attempting to settle the debts so assumed by personal notes, etc.: *Held*, the plaintiffs are not entitled to recover, and a judgment as of nonsuit should have been allowed.

APPEAL by Mrs. Allie A. Cromwell from *Moore, J.*, and a jury, at March Term, 1928, of MADISON. Reversed.

Allie A. Cromwell, on 13 August, 1927, instituted this action against Carl M. Logan and Ralph Beacham, in the Superior Court of Buncombe County, N. C., to recover on the following note alleged to have been assumed by them, viz.:

"$4,000.00. Asheville, N. C., 12 December, 1925.

On or before one year after date without grace, for value received, we, or either of us, promise to pay to the order of Allie A. Cromwell, Four Thousand and No/100 Dollars, with interest after date until paid. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.

Due 12 Dec., 1926. GRACE S. LOCK. (Seal.)
No. 1."

(1) The note was secured by deed of trust of even date made by Grace S. Lock (widow) to Guy Weaver, trustee for Allie A. Cromwell, which was duly recorded in the office of the register of deeds in Madison County, N. C., where the land was situate.

(2) Grace S. Lock on 5 February, 1926, after executing the above deed in trust conveyed the land to the Walnut Mercantile Company, a corporation. This deed was duly recorded in Madison County, N. C., and the said Walnut Mercantile Company assumed and agreed to pay said note of $4,000 to Allie A. Cromwell.

(3) The Walnut Mercantile Company, on 7 September, 1926, conveyed said land to Carl M. Logan and Ralph Beacham. This deed was duly recorded in Madison County, N. C. The agreement in the deed is as follows: "That said lands and premises are free from any and all encumbrances excepting a balance of about $14,000 on deed of trust originally for $15,000, payable to S. R. Freeborn, second deed of trust for $4,000 to Allie A. Cromwell; and taxes for the year 1926, all of which obligations are assumed by the grantees as a part of the purchase price." Thereafter Carl M. Logan and Ralph Beacham conveyed said land back to the Walnut Mercantile Company with like assumption of debts.

Carl M. Logan and Ralph Beacham set up as a defense: (1) Actionable fraud; (2) mutual mistake in respect to their assumption of the Allie A. Cromwell note.

Carl M. Logan and Ralph Beacham subsequently instituted an action against the Walnut Mercantile Company, a corporation, and C. B. Mashburn, receiver of the Walnut Mercantile Company, in the Superior Court of Madison County, N. C., praying that the above provision in regard to their assumption of the plaintiff's note be set aside (1) for actionable fraud, (2) mutual mistake.

By consent the actions were consolidated and tried together in Madison County, N. C., and the plaintiff, Allie A. Cromwell, in this action, was made a party defendant to the latter action brought by Logan and Beacham. Several issues were submitted to the jury, the only one answered and now material to be considered is the first:

"Was the provision in the deed by the Walnut Mercantile Company to Carl M. Logan and Ralph Beacham, whereby they agreed to assume and pay a debt of $4,000 to Allie A. Cromwell, and a balance of about $14,000, inserted therein fraudulently and wrongfully and without the knowledge and consent of said Logan and Beacham? Answer: Yes."

The defendants, Carl M. Logan and Ralph Beacham, contended that there was an original contract made between them and the Walnut Mercantile Company, which was lost, which did not contain the personal assumption clause of the debts. That Edward Lock was secretary of the Walnut Mercantile Company, and he stated that if we traded for the stock of merchandise "We would not be in any way personally liable for the debts of the corporation."

Carl M. Logan testified: "About a week later we went back to Walnut and saw Mr. Lock again. We went over the stock of goods carefully, and Mr. Lock said the company owed $5,700 on stock of goods on open account, $2,400 to Citizens Bank of Marshall, $1,500 on the store fixtures, and $18,000 on the store building and grounds, the latter being secured by deeds of trust thereon. He said he would transfer to us the corporation and we would not be personally liable for any of this indebtedness. He said, however, that it would be necessary in conveying the real estate for the corporation to make a deed to myself and Beacham personally, as that was the only way a corporation could convey real estate. I did not know anything about corporations, and relied on that statement of Mr. Lock. . . . A few days later we met at the attorney's office to close the contract. When Mr. Beacham and I arrived Mr. and Mrs. Lock were there and the attorney. We did not employ the attorney; he represented the Locks. We did not have any lawyer. When we entered, Mr. and Mrs. Lock were signing the certificates of stock. When through, they laid the stock and a deed on the table. We delivered to them the deed we had had prepared for the lots in Sunburst Mountains, Inc., and Mr. and Mrs. Lock then left the office. *We had not read the deed nor the certificate of stock. I supposed they had prepared it according to the contract.* I had not instructed the attorney or any one else to insert in the deed that we would personally assume and agree to pay the debts of the corporation. After the Locks left, we told the attorney we wanted to elect officers for the corporation. *He asked if we wanted to convey the property back to the corporation. We told him we did, and asked him to prepare the deed.* He prepared the deed, and we properly executed it, and *about ten days later registered them at Marshall.* The deeds were in the attorney's office until the day we took them to Marshall. It was several months afterwards before I learned that the clause concerning the personal assumption of the debts of the corporation had been inserted in the deed. We were trying to trade the property to some people, and went to the attorney's office in regard to it, when he mentioned to us that according to the deed we were personally liable for the debts of the corporation. We asked the attorney why that was put in the deed, and he said they just put one over on us." On cross-examination he testified: "*I was about thirty years old when I received deed from Walnut Mercantile Company. Have high school education. Have traded a good deal. Have been in the real estate business for some time. I own considerable property. I consider myself an intelligent business man.* Received deed in Asheville and registered it in Marshall. Registered deed about 10 days after we closed deal. Beacham and I went to Marshall together when we registered deed. Could not read deed while I was driving automobile to Marshall. Cannot remember salary I was getting after I took charge of corporation. *No one prevented us from reading the deed. Nothing was said by Lock or any one else to prevent us from reading deed.* The attorney is a man of good character. *Paid Wilkins to release us from the first mortgage assumed in the deed.* Wrote Mrs. Cromwell the following letter:

'Asheville, N. C., 28 September, 1926.

Mrs. Allie A. Cromwell,
522 W. 27th Street, Norfolk, Va.

DEAR MADAM: Ralph Beacham and I have bought out the Walnut Mercantile Company, and find you hold a second mortgage of $4,000 against the building, due February, 1926. When we bought the business it was in pretty bad shape, and we are getting it straight as fast as possible. We are going to pay it out. *We would like to get you to extend your note one year, and we will start paying you $50 and interest each month, for one year, and then pay all the balance December, 1927.* We will appreciate it very much if you will do this, and we will be prompt with our payments. Yours very truly,

CARL M. LOGAN.

P. S.—Please let us hear from you.'

The business was a cash business. Went on the rocks after we took charge."

The testimony of Ralph Beacham was to like effect: "I saw the written contract between us and the Walnut Mercantile Company. Mr. Gasque had it. I read it carefully. It did not provide that we were to assume the debts of the corporation. The contract stated that we were to convey our twenty-seven lots in subdivision known as Sunburst Mountains, Inc., in Haywood County, for the stock of the Walnut Mercantile Company, of a stock of goods and store building at Walnut, N. C. It also set out the amount of indebtedness against the Walnut Mercantile Company. It did not say anything about us assuming the debts of the corporation. We were in the attorney's office some time after our trade was closed in regard to another transaction, and the attorney said to us that the Locks had put one over on us. Lock afterwards tried to trade with us for the Walnut Mercantile Company. He saw us several times about it. He always said, 'If we trade all you will have to do is just transfer the stock to us.' "

On cross-examination: *"I am a business man. Have traveled for Armour & Company about eight years.* Don't know whether the $4,000 mortgage was part of purchase price or not. Paid Gasque $900. Have had several transactions in real estate. Logan and I went through the real estate in Asheville and were not hurt. We were in the real estate business together. All land we conveyed to Lock, twenty-seven lots in Sunburst Mountains, Inc., in Haywood County, rough and steep. It included right to hunt and fish over 3,500 acres of land. Don't know exactly how much, perhaps between four and five acres, represented to Locks as real estate development. Showed them a map with property laid off as in lots. Represented to Locks as being worth between $8,000 and $9,000. Allowed salaries from corporation to myself $150 per month. I worked every other day. Logan $150 per month. He worked every other day. Mr. Price $135 per month. Lawson and wife $175 per month. Came with Logan to Marshall and we registered the deed containing assumption clause. *Knew about the letter Logan wrote Mrs. Cromwell.* Don't remember asking attorney how to avoid personal liability. *No one prevented us from reading deed.* Had charge of corporation for about fifteen months. Operated on cash basis. Went on rocks after we took charge. *The attorney made no representations. The attorney is a man of good character.*"

The attorney, Edward Lock and Mrs. Lock, his mother, all testified that it was well understood that Carl M. Logan and Ralph Beacham were to, and did, become personally responsible. That the original contract had this agreement and the assumption was put in the deeds with full knowledge and in accordance with agreement. That nothing was done to prevent Logan and Beacham from reading the deeds.

Allie A. Cromwell testified: "Received letter from Logan. That is the letter (same letter was introduced as appears in cross-examination of Logan, the letter head being as follows: 'Carl M. Logan, Builder and Real Estate'). *Borrowed money to come down here and settle with Logan. He tried to give me a lot in West Asheville for my mortgage.* He showed me two lots and said that there was a mortgage against each of them—a house on one of them. *Logan said, 'I know I will have to pay you, but I can't now.'* I said, *'I'm a widow, Mr. Logan; give me my money and let me go back home.'* "

On cross-examination: "Nothing was said about taking notes as a compromise. I did not understand it that way. Lock did not tell me that my mortgage would be a first mortgage."

Carl M. Logan testified: *"I offered notes to Mrs. Cromwell as a compromise.* Notes secured by real estate in West Asheville. Notes ran over period of twenty years. I did not want to go to court. I did not sign the contract with any addition to it that Mrs. Lock says was added to it."

At the close of Logan's and Beacham's evidence, treated as plaintiffs in this action, and at the close of all the evidence, Allie A. Cromwell, as defendant in case against her of Logan and Beacham, moved for judgment as in case of nonsuit. C. S., 567. The court below denied the motion. Allie A. Cromwell excepted, assigned error and appealed to the Supreme Court.

Roberts, Young & Lane for Carl M. Logan and Ralph Beacham.
Claude L. Love, Oscar Stanton and Geo. M. Pritchard for Allie A. Cromwell.

CLARKSON, J. It is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is "entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *Nash v. Royster,* 189 N. C., at p. 410.

The jury only passed on the issue of actionable fraud, and we will consider alone this aspect. Was there sufficient evidence to be submitted to the jury? We think not.

Speaking to the subject of actionable fraud, in *Leonard v. Power Co.,* 155 N. C., at p. 17, it is said: "It is true that a person who can do so is generally required to read a paper before signing it, and his failure to do so is negligence for which the law affords no redress. This rule does not apply, however, in case of positive fraud or false representation made by another party, by which the person signing the paper is lulled into security or thrown off his guard and prevented from reading it, and induced to rely upon such false representations or fraud." *Taylor v. Edmunds,* 176 N. C., 328; *Oil and Grease Co. v. Averett,* 192 N. C., 465; *Butler v. Fertilizer Works,* 193 N. C., 632.

We think the law above stated is well settled in this jurisdiction, but the facts in this case do not come within the principle above set forth. We think the law applicable as stated in *Forbes v. Mill Co.,* 195 N. C., at p. 54-5, quoting from *Colt v. Kimball,* 190 N. C., at p. 172-3, *Varser, J.,* speaking for the Court, citing a wealth of authorities, said: " 'Defendant's testimony shows that he is a man of education and prominence, accustomed to the transaction of business, and of much experience, with more than an average education, who has served on the board of education for Vance County for many years. It was his duty, unless fraudulently prevented therefrom, to read the contract, or, in case he was not able to read the fine print without stronger glasses, to have it read to him. This rule does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it the salutary principle that each one must 'mind his own business' and exercise due diligence to know what he is doing. Having executed the contract, and no fraud appearing in the procurement of the execution, the Court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not. He is concluded thereby to the same extent as if he had known what due diligence would have informed him of, to wit, its plain provisions that the agent had no authority to make agreements other than those contained therein, and that such agreements, if made, were not a part of the contract.' *Furst v. Merritt,* 190 N. C., 397; *Dunbar v. Growers,* 190 N. C., 608; *Hoggard v. Brown,* 192 N. C., 494; *Finance Co. v. McGaskill,* 192 N. C., 557." See *Peyton v. Griffin,* 195 N. C., 685.

In *Abel v. Dworsky,* 195 N. C., p. 868, it is said: "There was other evidence tending to show ratification. If plaintiffs discovered the fraud and ratified the sale, they cannot now recover in this action. 12 R. C. L., p. 412; *Darden v. Baker,* 193 N. C., 386." *Sugg v. Credit Corp., ante,* page 97.

"One who has assumed or contracted for the payment of another's debt may be sued directly by the creditor." *Glass Co. v. Fidelity Co.,* 193 N. C., at p. 772.

Carl M. Logan and Ralph Beacham were men of education and intelligent business men and in the real estate business together. Both testified that nothing was said at the time to prevent them from reading the deeds. (1) A deed was made to them by the Walnut Mercantile Company with the assumption of Allie A. Cromwell's note. (2) After they had purchased the stock they then made a deed back to the Walnut Mercantile Company with the assumption of Allie A. Cromwell's note. They took both deeds to Marshall, N. C., and recorded them about ten days after the deal was made. The deeds were dated 7 September, 1926. The stock of merchandise was in the building that Allie A. Cromwell had a second lien on. They ran the business about fifteen months. They purchased the business 7 September, 1926, and this $4,000 note was due 12 December, 1926, and the deed of trust could have been foreclosed at that time. 28 September, 1926, Carl M. Logan wrote Allie A. Cromwell (Ralph Beacham testified, "I knew about the letter Logan wrote Mrs. Cromwell"): "We would like to get you to extend your note one year, and we will start paying you $50 and interest each month for one year, and then pay all the balance December, 1927." Ralph Beacham testified, "The attorney made no representations. The attorney is a man of good character." Other indicia of negligence and ratification: (1) By raising no question as to the personal liability until they were sued in the courts, and in the meantime having the deeds showing the assumption of Allie A. Cromwell's debt. (2) By defendant Logan obtaining from one

Wilkins at personal cost to him, a release from the first mortgage against the real estate, which amounted to $14,000. (3) By attempting to pay the $4,000 note by the transfer and delivery to Allie A. Cromwell of certain promissory notes, payable over a period of twenty years, which were the personal property of the defendant, Logan, and in which the Walnut Mercantile Company had no interest whatsoever.

On the entire record we think there is no sufficient evidence to sustain the verdict, and the motion for judgment as in case of nonsuit should have been granted. For the reasons given the judgment is

Reversed.